Supreme Court of the United States

October Term, 1977

No. 77-426

IN RE: WILLIAM T. WULIGER
Petitioner

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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IN RE: WILLIAM T. WULIGER

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OPINIONS DELIVERED BELOW

Petitioner was convicted for contempt in the Court of Common Pleas, Cuyahoga County, Ohio; the conviction was journalized in the attached journal entries (Appendix pp. A1-A3). The matter was appealed to the Court of Appeals, Eighth Judicial District, State of Ohio, which delivered its unreported opinion (Appendix pp. A5-A13). The matter was then appealed to the Supreme Court of the State of Ohio which granted jurisdiction and then after argument ruled that no final appealable order was present (See Appendix pp. A15-A16). During the pendency of these appeals the matter was also heard in disciplinary proceedings by the Greater Cleveland Bar Association (See Record R. 134).

BASIS FOR INVOKING OF JURISDICTION

This cause is before this court having been decided by the Eighth District Court of Appeals of Ohio and jurisdiction having been refused by the Supreme Court of the State of Ohio. The decisions of these courts are violative of the protections of the Fifth and Fourteenth Amendments to the United States Constitution in that they violate the guarantees of the protection against double jeopardy and due process of law and that they are not in accord with applicable decisions of this court.

The instant petitioner was summarily convicted of three charges of alleged contempt on October 1, 1974, October 11, 1974 and October 25, 1974. On December 2, 1974 he was sentenced to five days for the first charge, ten days for the second charge and fifteen days for the third charge; all to run consecutively. The conviction was appealed to the Eighth District Court of Appeals of Ohio and on May 7, 1976 it was decided that the trial court's journal entries failed to state a finding of fact which supported the conviction, found that the trial court was personally involved and prejudiced at the time of sentencing and found insufficient facts to justify the conviction in the transcript. It ordered the case remanded for a new finding of fact by the original trial court and then transferred to a second court for sentencing (Appendix pp. A12-A13). A motion for reconsideration was filed by petitioner and was overruled on May 28, 1976. The matter was then appealed to the Supreme Court of Ohio which granted leave to certify the record on October 8, 1976. On April 13, 1977 the Supreme Court of Ohio, after hearing, dismissed the case, sua sponte, for want of a final appealable order. A motion for a rehearing was overruled on May 6, 1977.

QUESTIONS PRESENTED FOR REVIEW

I. Does a Violation of the Fifth and Fourteenth Amendments of the United States Constitution Occur When a Trial Court Whose Record Fails to Contain a Sufficient Factual Basis to Support a Finding of Summary Contempt Is Allowed on Remand to Create a Factual Basis to Support a Conviction?

II. Does a Violation of the Guarantee of Due Process of Law of the Fourteenth Amendment to the United States Constitution Occur When a Trial Court That Has Been Determined to Be Incapable of an Impartial and Unbiased Attitude Toward Petitioner Is Allowed to Make a Redetermination of the Evidentiary Basis for a Finding of Direct Contempt?

CONSTITUTIONAL PROVISIONS

United States Constitution, Amendment V:

No person shall be . . . twice put in jeopardy of life or limb.

United States Constitution, Amendment XIV:

. . . (Nor) shall any State deprive any person of life, liberty, or property, without due process of law.

STATUTORY PROVISIONS

OHIO REVISED CODE, Section 2705.01

Summary Punishment for Contempt

A court, or judge at chambers, may summarily punish a person guilty of misbehaviors in the presence of or so near the court or judge as to obstruct the administration of justice.

STATEMENT OF CASE

Petitioner, a licensed attorney of the State of Ohio, was appointed to represent Charles Jordan in Cuyahoga County Court of Common Pleas Case No. CR. 14174. During the trial of this case, a trial which lasted many weeks, petitioner was summarily found in contempt on three occasions (App. pp. A1-A3), then was sentenced to a total of thirty (30) days in jail (App. p. A4).

The basis for the contempt convictions was apparently petitioner's conduct in the questioning of witnesses. At the time of the first contempt citation, the court referred to a conference and admonitions on the previous day (T. 2604-2605, R. 57, 58). However, in examination of that record, there is no evidence of either a specific order or instruction (T. 2315-2344, R. 17-46). On the other two occasions the court referred to an admonition which it claimed was given the petitioner, but which does not exist in this record (T. 4330-4331, R. 63-66 and T. 6373-6385, R. 69-82). The basis for the contempt and the specific questions on at least two of the alleged contempts is not clear in the record and the issue throughout is how the questions complained of disturbed the court's business or violated a specific court order.

Beginning early in the trial and continuing throughout its course, a personal antagonism between the court and the petitioner is apparent in the record (See Record 1-25, 61-62, 83-92). Subsequent to the adjudication for contempt, the trial court filed a complaint with the Grievance Committee of the Greater Cleveland Bar Association and made a concerted effort to pursue the complaint (R. 134).

At the time of his sentencing, petitioner was not given prior written notice of the contempt charges. Also, although found in contempt during the trial, sentencing was deferred until after the end of the trial in CR. 14174. On November 7, 1974, shortly before the end of that trial, Petitioner filed a Motion for a Hearing Before a Disinterested Judge, Personal Bond Pending Outcome of Proceedings, Written Specification of the Charges and Jury Trial. Despite the motion, at no time did the trial court set forth what order, if any, it felt had been violated, nor at any time did it set forth what conduct or statements by Petitioner it felt had been contemptuous. Also, despite the fact that the court had made many comments which indicated its bias against Appellant, the court refused to assign another judge to Appellant's case.

On November 15, 1974, three of the defendants in CR. 14174, including Charles Jordan, were found guilty on a number of counts and not guilty on a number of other counts. The jury could reach no decision on the remaining counts against these defendants. The fourth defendant was found not guilty on all counts. Further proceedings in the matter of Petitioner's contempt were scheduled for November 18, 1974, but on that date, without any hearing, the proceedings were continued until November 20, 1974. On November 20, some discussion was held on the record between the trial court, co-counsel for Petitioner, and Petitioner, but that discussion was limited to (1) the reason

for the prior continuance, and (2) the motion filed on November 7, 1974 (See transcript of contempt proceedings of November 20 and December 2, Contempt Transcript, 3-26, R. 95-118). The proceedings were again continued until Petitioner finished representing a defendant in a trial which was then in progress. On December 2, 1974, the final proceedings were had in the matter of Petitioner's contempt (Contempt Transcript, 27-39, R. 119-131). The trial court denied the motion filed on November 7, 1974, said that Petitioner had already been found in contempt, and also said that the only question to be addressed at the proceeding was sentencing (Contempt Transcript, 17 and 31, R. 109, 123). The trial court then sentenced Petitioner to 5 days in jail for the contempt of October 1, ten days in jail for the contempt of October 11, and fifteen days in jail for the contempt of October 25, all sentences to be served consecutively (App. p. A4).

Immediately after he had been sentenced, Petitioner filed in the Court of Common Pleas a Notice of Appeal and a Motion for Personal Bond and an Order to Stay Execution of Sentence Pending Appeal. The motion was denied by the trial court. In fact, the trial court refused to stay execution of sentence or set any bond for the appeal (Transcript, 38 and 39, R. 130-131). Neither at sentencing nor at any time since has the trial court issued written findings setting forth the order allegedly violated or the question allegedly asked by Petitioner which constituted the contempt in the mind of the court.

After the trial court had denied Petitioner's motion for an appeal bond, Petitioner filed in the Court of Appeals a Motion for Personal Bond and an Order to Stay Execution of Sentence Pending Appeal. On December 2, 1974, the Court of Appeals granted said motion and Petitioner was released from jail upon signing a $1,000 personal bond.

On December 12, 1974, in spite of the fact that the trial court had not given Petitioner notice of what questions caused him to be cited for contempt and in spite of the fact that the trial court had indicated that the relevant portions of the transcript could not be prepared quickly enough to be used for Petitioner's contempt proceedings (Contempt Transcript, 31, R. 123), the trial court submitted to the Grievance Committee of the Bar Association of Greater Cleveland a letter of complaint against Petitioner for his alleged conduct in and surrounding the trial of Charles Jordan. Attached to his letter of complaint were excerpts from the transcript of the trial of Charles Jordan, showing among other things, that the Petitioner had been found in contempt three times but not showing the questions leading to the first and third findings of contempt.

Subsequently the Subcommittee of the Bar Association indicated in preliminary reports that not only did it not find misconduct in the conduct which is the basis for this contempt but further raised an additional opinion that the conduct was not contemptuous (R. 197-209). When the trial court learned of this preliminary finding, members of the committee were contacted by the court and were requested to review their findings (R. 199).

Subsequently the Bar Association dismissed all but one of the allegations of misconduct. That allegation was regarding alleged misconduct after the sentencing of the appellant and was unrelated to the conduct which was allegedly the basis for the contempt.

This appeal was perfected after the proceedings in the Cuyahoga County Court of Appeals and the Supreme Court of Ohio.

During the course of argument before the Court of Appeals, the Appellate Court questioned counsel for re-

spondent regarding the Appellate Court's difficulty in finding a definitive order which it was alleged that the petitioner had violated and which gave rise to the contempt. In order to supply the court with that order, counsel for respondent was given leave to file a Supplemental Brief containing that information. When the Supplemental Brief was filed the non-existence of such an order remained apparent.

A motion for reconsideration was filed on May 17, 1976 with the Court of Appeals. That motion raised the issues that a remand to allow a new journal entry was a violation of the guarantees against double jeopardy and due process. The same issue was raised on appeal to the Supreme Court of Ohio in the Memorandum Supporting Jurisdiction and the Brief filed with that court.

ARGUMENT

I. WHEN A TRIAL COURT FAILS TO PROVIDE A SUFFICIENT FACTUAL BASIS TO SUPPORT A CONVICTION FOR SUMMARY CONTEMPT, THE COURT IS PROHIBITED BY THE GUARANTEES OF DUE PROCESS OF LAW AND THE PROHIBITION AGAINST DOUBLE JEOPARDY FROM CREATING A NEW FACTUAL BASIS TO SUPPORT THE CONVICTIONS.

This question presents to this Court the question of the proper appellate remedy when a trial court fails both in its journal entry and in the trial record itself to provide a factual basis to support a finding of summary contempt. The journal entries filed by the trial court contain only the conclusion that the petitioner was found in contempt (See Appendix pp. A1-A3). The trial court failed to state the

basis for the contempt at the time of its citation of petitioner during trial (T. 2605, 4331, 6385, R. 58, 68, 81). Finally the trial court refused to provide petitioner with a factual notice of the basis for the contempt at the time of adjudication.

In its opinion the Eighth District Court of Appeals held that the failure of the trial court to provide a factual basis for the three contempt citations was reversible error (Court of Appeals Opinion, App. pp. A5-A13). The Court of Appeals also addressed itself to the question of whether the cited conduct was itself contemptuous. It concluded that the petitioner asked improper questions, but went on to say that the asking of improper questions was itself insufficient to rise to the level of contempt. Finally the court's opinion noted "the standard of conduct (was) too vague and the improper questions too innocuous to justify criminal contempt proceedings." (*id.* at A12). The Court of Appeals then remanded the case to the trial court to allow that court to create a factual basis to justify its findings of summary contempt.

The petitioner claims that the remand by the Eighth District of Ohio Court of Appeals was erroneous and in violation of petitioner's constitutional guarantees of due process and prohibitions against double jeopardy.

This Court has in *Michaelson v. United States*, 266 U.S. 42, 45 S. Ct. 18 (1924) ruled that prosecution for criminal contempt is synonymous with any other criminal proceeding. As the Court said,

> In criminal contempts, as in criminal cases, the presumption of innocence obtains. Proof of guilt must be beyond a reasonable doubt and the defendant may not be compelled to be a witness against himself. The fundamental characteristics of both are the same.

> Contempts of the kind within the terms of the statute partake of the nature of crimes in all essential particulars. "So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure." *Id.* at 66, 67, 45 S. Ct. at 20. (Citations omitted.)

In previous criminal cases, where this court has been faced with a general finding of guilty without a specified basis for that verdict, and where the conviction may be based on illegal grounds, this Court has ruled that it is not proper to remand the case for a *post hoc* explanation for the grounds of a judicial decision. *Street v. New York,* 394 U.S. 576, 587, 89 S. Ct. 1354, 1363 (1964). In the line of cases cited in *Street, supra,* the Court's reasoning has consistently held that where a general verdict does not specify the ground upon which it rested and one or more of the possible bases for the conviction is invalid, it is impossible to determine that the conviction was valid and the conviction, therefore, can not be upheld. See *Stromberg v. California,* 283 U.S. 359, 51 S. Ct. 532 (1931); and *Williams v. North Carolina,* 317 U.S. 287, 63 S. Ct. 207 (1942)

Similarly, in a contempt case the alleged contempt occurred at a meeting in which there was an alleged violation of a court's restraining order by means of soliciting a single individual to join a union and by soliciting all non-union men present, *Thomas v. Collins,* 323 U.S. 516, 65 S. Ct. 315 (1945) the court refused to consider the contention of the state that the judgment of contempt could be sustained by the individual solicitation alone. The Court stated:

> The motion for the fiat in contempt was filed and the fiat itself was issued on account of both invitations.

> The order adjudging Thomas in contempt was in general terms, finding that he had violated the restraining order, without distinction between the solicitations set forth in the petition and proved as violations. The sentence was a single penalty. In this state of the record it must be taken that the order followed the prayer of the motion and the fiat's recital, and that the penalty was imposed on account of both invitations. The judgment therefore must be affirmed as to both or as to neither. Cf. *Williams v. North Carolina,* 317 U.S. 287, 292, 63 S. Ct. 207, 210, 87 L.Ed. 279, 143 A.L.R. 1273; *Stromberg v. California,* 283 U.S. 359, 368, 51 S. Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484. 323 U.S., at 528-529, 65 S. Ct., at 322. (Footnotes omitted.)

After the Court concluded that a conviction based on the general solicitation could not stand, the entire conviction was reversed. Further, as noted in *Street v. New York, supra,* at 587, 89 S. Ct. at 1363, *Thomas, supra,* was not remanded for resentencing but the conviction itself was reversed.

The secondary question in this analysis is whether the conviction was constitutional. However, that question does not arise in this case because the lower court found that despite its reading of the record, the facts which it found were insufficient to rise to the level of contempt.

Thus, this Court has held where a general verdict supports a conviction and the court can not determine the legality of that conviction because of the generality of the verdict then the conviction can not be upheld. Similarly, in other jurisdictions when a trial court has failed to assure the existence of a factual basis to support a contempt conviction, the conviction is reversed and a final entry of discharge is entered in behalf of the defendant. See *People*

v. Miller, 51 Ill. 2d 76, 281 N.E.2d 292 (1972); *Robinson v. State*, 19 Md. App. 20, 308 A.2d 712 (1973); *Ex Parte David W. Brown*, 530 S.W.2d 228 (Missouri Supreme Court, 1975); *Ward v. State*, 513 P.2d 350 (Okla. Ct. of Crim. App., 1973); *United States v. Schrinisher*, 493 F.2d 842 (5th Cir., 1974).

Petitioner, therefore, states that the due process guarantees as stated in *Street v. New York, supra,* and *Thomas v. Collins, supra,* prohibit the remand of the instant case, in which it is clear that not only is there no factual basis for the conviction in the journal entries of conviction, but further, there is no basis in fact in the transcript of the trial itself.

Finally, Petitioner argues that remand to allow the trial court to construct a factual basis in support of its previous findings is tantamount to placing the appellant in jeopardy of a second conviction in violation of the protections of the double jeopardy clause of the Fifth Amendment of the United States Constitution. The protection of the double jeopardy clause as explained by Mr. Justice Black in *Green v. United States*, 355 U.S. 184 (1957) is

> The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity as well as enhancing the possibility that even though innocent he may be found guilty. *Id.* at 187-188.

The risk of multiple prosecution occurs when the state puts forth its proof and fails to convict and then makes a second attempt for the same conviction. The right to

be free from the "risk of hazard" of multiple prosecutions and the threat of multiple punishments has been deemed to be included in the concept of "essential fairness" requisite for very trial and has, thus, been made applicable to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784 (1969).

In the instant proceedings, the trial court proceeded to convict the petitioner for direct contempt. It has been the position of the Petitioner throughout that the conduct complained of did not rise to the level of direct or summary contempt. The trial court failed to respond to this issue and failed to provide any basis for its conviction in its journal entry. The Court of Appeals found insufficient evidence in the instant record to support the trial court's conviction. To remand the case for a new finding of fact by the trial court is essentially allowing the trial court to "try again" to locate evidence in the record to support its determination of guilt. The petitioner argues such a proceeding falls squarely within the definition of double jeopardy.

The petitioner, therefore, contends that the Court of Appeals erred when it remanded the instant case for an additional finding of fact. The petitioner contends that upon the findings and conclusions stated in its opinion, the proper remedy pursuant to due process guarantees and the prohibition against double jeopardy was to reverse the trial court's decision and enter a final entry of dismissal, discharging the petitioner.

II. WHEN A TRIAL COURT IS DETERMINED TO HAVE BECOME INCAPABLE OF AN IMPARTIAL AND UNBIASED ATTITUDE TOWARDS A PETITIONER, THE GUARANTEES OF DUE PROCESS OF LAW OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBIT THAT COURT FROM CREATING A FACTUAL BASIS TO SUPPORT A FINDING OF DIRECT CONTEMPT.

Due process of law requires that a trial judge "hold the balance" nice, clear and true between the state and the accused. *Tumey v. Ohio*, 273 U.S. 510 (1927). In determining this standard of conduct, the inquiry must be not only whether there was actual bias on the part of the trial court but also whether "there was such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." *Ungar v. Sarafite*, 376 U.S. 575 (1964). In its order and opinion of May 7, 1976, this Court of Appeals found, in its response to petitioner's Assignments of Error III and IV that the trial judge was not so embroiled in the controversy with the appellant at the time of the findings of contempt to require him to excuse himself. However, the court did find, at the time of sentencing, that the trial judge was incapable of impartial and unbiased sentencing, and required the court to remove himself from the question of sentencing on remand. In support of its finding, the Court's opinion referred to certain portions of the transcript in its footnote. The petitioner concurs with the court's findings regarding the attitude of the trial court at the time of sentencing. The petitioner, however, argues that this attitude existed at the time of the original contempt citations. Three of the four examples relied upon by the Court of

Appeals in its footnote, are the exchanges which occurred prior to, or at the time of, the initial finding of contempt (T. 1667, 2334, 2606, R. 12, 36, 59). Further, after the findings of contempt the trial court vigorously prosecuted its complaints before the Bar Association of Greater Cleveland.

However, even accepting the Court of Appeals' findings on this issue, the appellant argues that it would now be improper to permit the trial judge to prepare a journal entry which justifies the finding of contempt, to select what he considers the relevant portions of transcript and then leave the question of sentencing to another court. If the trial judge was biased and partial toward the defendant at the time of sentencing, there is no evidence to indicate that that condition does not remain at the present time.

The United States Supreme Court in *In re Murchison*, 349 U.S. 133 (1955) dealt with the issue of a judge who was both the accuser and the trier of fact. Mr. Justice Black stated at page 136:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that 'every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.' *Tumey v. Ohio*, 273 U.S.

510, 532. Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14.

In applying *Taylor v. Hayes*, 418 U.S. 488 (1974) the Court must look to the question of whether the trial court has become embroiled in a running controversy with counsel so as to result in bias, a likelihood of bias or appearance of bias. In applying this test to the question of the trial court at the time of sentencing, the Court of Appeals has responded affirmatively. Yet, at the same time, the opinion returned to the same trial court's judicial discretion the question of whether the appellant's conduct was contemptuous, and, if in its discretion it finds that it was, the opinion calls upon this same trial court judiciously to justify that finding either by transcript portions or journal entry. Upon completion of that task, the trial court, under the opinion, once again loses its freedom from bias and impartiality and must return the case to another court for sentencing.

The petitioner contends that holding such a procedure is improper. The petitioner contends that, if remand was proper, the proper procedure, if the trial court is desirous of proceeding would be to transfer the guilt determinative function to the sentencing judge. Such a procedure would assure the appellant a determination by an independent trial court, after a full hearing, as to whether the complained of conduct is contempt in an atmosphere of "calm detachment necessary for fair adjudication." *Mayberry v. Pennsylvania*, 400 U.S. 455 (1971).

CONCLUSION

Petitioner respectfully requests that this petition be granted. Petitioner further requests this Honorable Court to vacate the order of the Eighth District Court of Appeals of Ohio and order that court to order the petitioner discharged from further prosecution. The petitioner alternatively requests this Court to order the matter remanded to an independent trial court for redetermination.

Respectfully submitted,

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APPENDIX

JUDGMENT ENTRY OF THE COURT OF COMMON PLEAS

(Filed October 1, 1974)

No. CR-14174

IN THE COURT OF COMMON PLEAS

STATE OF OHIO,)
) SS.
CUYAHOGA COUNTY)

STATE OF OHIO,
Plaintiff,

VS.

CHARLES JORDAN, *et al.*,
Defendant.

INDICTMENT Aggr. Burglary w/cts

JOURNAL ENTRY

Attorney William T. Wuliger, found to be in Contempt of Court.

/s/ JOSEPH J. NAHRA
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed October 11, 1974)

No. CR-14174

IN THE COURT OF COMMON PLEAS

STATE OF OHIO,)
) ss.
CUYAHOGA COUNTY)

STATE OF OHIO,
Plaintiff,

vs.

CHARLES JORDAN,
Defendant.

INDICTMENT Aggr. Burglary w/cts

JOURNAL ENTRY

Attorney, William T. Wuliger, found to be in Contempt of Court.

/s/ JOSEPH J. NAHRA
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed October 25, 1974)

No. CR 14174A

IN THE COURT OF COMMON PLEAS

TITLE: Aggravated Burglary w/cts

STATE OF OHIO

vs.

CHARLES JORDAN *et al.*

Atty William T. Wuliger found to be in contempt.

/s/ JOSEPH J. NAHRA
Judge

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS

(Filed December 2, 1974)

No. CR-14174

IN THE COURT OF COMMON PLEAS

STATE OF OHIO,)
) SS.
CUYAHOGA COUNTY)

STATE OF OHIO,
Plaintiff,

vs.

CHARLES JORDAN,
Defendant.

INDICTMENT Aggr. Burglary w/cts

JOURNAL ENTRY

WILLIAM T. WULIGER, sentenced to five (5) days in Cuyahoga County Jail on contempt of October 1, 1974, ten (10) days on contempt of October 11, 1974 and fifteen (15) days on contempt of October 25, 1974, sentence as to each charge to be served consecutively.

/s/ JOSEPH J. NAHRA
Judge

OPINION OF THE COURT OF APPEALS

(Dated May 7, 1976)

No. 34240

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

IN RE: WILLIAM T. WULIGER
Defendant-Appellant

APPEAL FROM COMMON PLEAS COURT

JOURNAL ENTRY

This cause came on to be heard upon the pleading and the transcript of the evidence and record in the Common Pleas Court, and was argued by counsel; on consideration whereof, the court certifies that in its opinion substantial justice has not been done the party complaining, as shown by the record of the proceedings and judgment under review, and judgment of said Common Pleas Court is reversed. Each assignment of error was reviewed by the court and upon review the following disposition made:

Defendant-appellant William T. Wuliger (defendant) is an attorney at law. The lawsuit giving rise to the cause before this court was a criminal trial in which he represented one of several co-defendants. In the course of the trial, Counsel Wuliger was found guilty of three direct contempts in three separate summary proceedings. A post-trial hearing on sentencing resulted in a total penalty of

thirty days in jail for Mr. Wuliger (Tr. Vol. 2, p. 40). He appealed assigning six errors:

"I) IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APPELLANT WITHOUT ISSUING WRITTEN FINDINGS SETTING FORTH THE ORDER WHICH APPELLANT ALLEGEDLY VIOLATED AND THE QUESTIONS ALLEGEDLY ASKED BY APPELLANT WHICH CAUSED THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT.

"II) IT WAS ERROR FOR THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT WITHOUT FIRST GIVING HIM WRITTEN NOTICE OF THE CHARGES AND AN OPPORTUNITY TO BE HEARD.

"III) IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO REMOVE ITSELF FROM PRESIDING OVER APPELLANT'S CASE.

"IV) IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A JURY TRIAL.

"V) IT WAS ERROR FOR THE TRIAL COURT TO HOLD APPELLANT IN CONTEMPT, BECAUSE HE WAS NOT IN CONTEMPT.

"VI) IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APPELLANT TO THIRTY DAYS IN JAIL."

To assist clarity the facts relevant to each assignment of error are detailed under the respective assignments.

For reasons assessed below we reverse and remand for further proceedings according to law.

"I) IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APPELLANT WITHOUT ISSUING WRITTEN FINDINGS SETTING FORTH THE ORDER WHICH APPELLANT ALLEGEDLY VIOLATED AND THE QUESTIONS ALLEGEDLY ASKED BY APPELLANT WHICH CAUSED THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT."

Upon any adjudication of contempt the trial court must, in order to afford the appellate court a basis for review, enter a written order specifically and completely setting forth the facts upon which the finding is based, *State v. Treon* (1963), 91 Ohio L. Abs. 229, 241-242, 188 N.E. 2d 308, 316; *White v. Kiraly, et al.* (Ct. App. 8th Dist., 1975, Case No. 34085, p. 2). The failure of the trial court, in the instant case, to enter such factual basis for each of the three contempt convictions constitutes reversible error.

Assignment of Error No. I is well taken.

"II) IT WAS ERROR FOR THE TRIAL COURT TO FIND APPELLANT IN CONTEMPT WITHOUT FIRST GIVING HIM WRITTEN NOTICE OF THE CHARGES AND AN OPPORTUNITY TO BE HEARD."

Due process requires notice of the charges and hearing on the merits when one or more of the elements of the contempt charged was not personally observed by the judge, *In Re Oliver* (1948), 333 U.S. 257, 275-276, 92 L.Ed. 682, 695; *Cooke v. United States* (1925), 267 U.S. 517, 69 L.Ed. 767.[1] However, assuming findings of contempt were

1. See also Ohio Revised Code §2705.03 which provides that in cases of indirect contempt the defendant has a right to be notified, in writing, of the charges against him prior to any hearing on the merits.

proper at all in this case, summary contempt proceedings were properly invoked because all of the defendant's conduct cited as contemptuous occurred in open court and was observed personally by the trial judge, see *In Re Oliver, supra; Ciraolo v. Madigan* (9th Cir., 1971), 443 F. 2d 314, 319.[2]

Notice and hearing were not required because the adjudication immediately followed each citation for direct contempt, only sentencing was postponed until after trial, cf. *Taylor v. Hayes* (1974), 418 U.S. 488, 497-498, 41 L.Ed. 2d 897, 906-907; *Codispoti v. Pennsylvania* (1974), 418 U.S. 506, 515, 41 L.Ed. 2d 912, 921.[3]

Assignment of Error No. II is not well taken.

"III) IT WAS ERROR FOR THE TRIAL COURT TO FAIL TO REMOVE ITSELF FROM PRESIDING OVER APPELLANT'S CASE."

"VI) IT WAS ERROR FOR THE TRIAL COURT TO SENTENCE APPELLANT TO THIRTY DAYS IN JAIL."

Although Assignments of Error III and VI raise different issues, there is but one factual pattern relevant to

2. On their facts, *Cirolo* and *Oliver* are clearly distinguishable from the present case. In those cases the trial courts' findings of summary contempt were violative of due process because those findings were based on inferences supported, in part, by facts not directly and personally observed by the court. Here, the first contempt was apparently based upon an inference of "knowledge" (Tr. 2605) but all the facts in support of the inference were observed by the court. The second and third contempts were based solely on questions asked by defendant in open court and were not based on any inferences.

3. In *Taylor* and *Codispoti* the Supreme Court held due process was violated, i.e., as notice and hearing, when both adjudication *and* sentencing were postponed until after trial, *Taylor v. Hayes* (1974), 418 U.S. 498, 41 L.Ed. 2d at 907; *Codispoti v. Pennsylvania* (1974), 418 U.S. at 515, 41 L.Ed. 2d at 921.

both issues. Therefore, we consider the assignments together.

The trial judge was competent to summarily adjudicate the contempt citations because he had not become so embroiled in controversy with defendant as to result in bias, the likelihood of bias, or the appearance of bias, see *Taylor v. Hayes* (1974), 418 U.S. 488, 501-502, 41 L.Ed. 2d 897, 909. Moreover, immediate adjudication in cases of direct contempt is necessary to preserve the authority of the court, *In Re Oliver* (1948), 333 U.S. 257, 275-276, 92 L.Ed. 682, 695. Therefore, there was no error in the trial judge's decision to adjudicate the charges of contempt if indeed there were direct contempts.

However, the trial judge committed reversible error when he passed sentence at the conclusion of the trial. By that time it was clear, from the character of his responses to defendant's conduct, *Taylor v. Hayes* (1974), 418 U.S. 488, 503 fn. 10, 41 L.Ed. 2d 897, 910 fn. 10, that the court was incapable of impartial and unbiased sentencing.[4] The trial judge should have removed himself from the case for purposes of sentencing.

Assignment of Error No. III is well taken.

Because it was error for the trial judge to enter any sentence, it was error to sentence defendant to thirty days in jail. We need not reach the question of whether the

4. Several examples, by no means exhaustive, of the court's attitude towards defendant indicate sufficient bias to render the court's sentencing improper: "You have a way of twisting the truth that defies anybody's sense of fairness . . ." (Tr. 1667); "Your sense of propriety leaves a great deal to be desired, Mr. Wuliger" (Tr. 2334); "You have a trial to complete, Mr. Wuliger, and I expect you to do it despite everything that you have done to try to cause a mistrial in this case . . ." (Tr. 2606); "It is always nice to get the truth after Mr. Wuliger has spoken . . ." (Tr. 7647).

thirty-day sentence was disproportionate. That question is for another court at another time.

Assignment of Error No. VI is well taken.

"IV) IT WAS ERROR FOR THE TRIAL COURT TO DENY APPELLANT'S MOTION FOR A JURY TRIAL."

Due process did not require that defendant be afforded a jury trial because the total penalties involved in the instant case were less than six months, see *Baldwin v. New York* (1970), 399 U.S. 66, 73-74, 26 L.Ed. 2d 437, 443.

There was no violation of defendant's right to Equal Protection of the laws. The legislative distinction, affording jury trials in some misdemeanor cases but not in instances of direct contempt, is rationally related to the State's interest in maintaining the court's authority by permitting summary contempt procedures in cases of direct contempt committed in open court, see *Ex Parte Terry* (1888), 128 U.S. 289, 302-303, 32 L.Ed. 405, 408; *In Re Oliver* (1948), 333 U.S. 257, 275, 92 L.Ed. 2d 682, 695; *Taylor v. Hayes* (1974), 418 U.S. 488, 497, 41 L.Ed. 2d 897, 907.[5]

Assignment of Error No. IV is without merit.

"V) IT WAS ERROR FOR THE TRIAL COURT TO HOLD APPELLANT IN CONTEMPT, BECAUSE HE WAS NOT IN CONTEMPT."

Due process in contempt cases requires notice and the opportunity to be heard except in a narrow category of direct contempts which includes:

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5. Even if any of defendant's fundamental rights were infringed, such distinction may be properly based on a "compelling state interest" to maintain the authority of the court, see *Roe v. Wade* (1973), 410 U.S. 113, 155, 35 L.Ed. 2d 147, 178.

> ". . . only charges of misconduct, in open court, in the presence of the judge, which disturbs the court's business, where all of the essential elements of the misconduct are under the eye of the court, are actually observed by the court, and where immediate punishment is essential to prevent 'demoralization of the court's authority' before the public." *In Re Oliver* (1948), 333 U.S. 257, 275, 92 L.Ed. 682, 695.

In this case it is clear that all the conduct in issue took place in the presence of the judge and was actually observed by him. Whether it disturbed the court's business sufficiently[6] to require summary action we cannot know at this juncture because the trial court's reasoning in support of the contempt finding is not available.[7] That same omission prevents an evaluation of the question whether the alleged misconduct involved violations of orders specific enough to constitute contempt. The record shows that improper questions were asked by the present defendant. But it is hardly conceivable that improper questions alone constitute extreme conduct which would justify a finding of criminal contempt. Therefore, improper questions could not be deemed contemptuous absent a court command defining the proscribed improprieties. And this must be done with sufficient precision to guide counsel and enable him to conform his conduct to the court's direction.[8] With-

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6. We leave open the question whether the immediate finding of contempt, without immediate sentencing, was punishment. If so, the requisite to such judicial retribution, is a conclusion that the punishment was necessary to prevent " 'demoralization of the court's authority' before the public". *In Re Oliver, id.*

7. See *State v. Treon, supra; Ohio v. Milano* (8th App. Dist., 1976, Case No. 34459).

8. See the second paragraph, footnote 49, of *In Re Brown* (D.C. Cir., 1971), 454 F.2d 999, 1008: "It seems worth noting, too, that 'before one may be punished for contempt for violating

(Continued on following page)

out this specificity the standard of conduct is too vague and the improper questions too innocuous to justify criminal contempt by summary proceedings.

We cannot determine Assignment of Error No. V in the absence of the factual basis for the trial court's action. The delineation of facts on remand may provide the basis for later consideration, under the guidance of those principles, should the case be appealed again.

On remand, if the trial court elects to go forward with this contempt proceeding, Judge Joseph Nahra is instructed to have produced, at the court's own expense, so much of the transcript of trial proceedings as is sufficient to demonstrate the claimed contempt. Judge Nahra is further instructed to prepare a journal entry which shall state the charges and findings of contempt made against appellant and cause same, together with the above-mentioned transcript of proceedings, to be filed with the Cuyahoga County, Ohio, Clerk of Courts. The journal entry shall contain a complete and clear statement of the factual basis for the claimed contempt and same shall be served upon the appellant. Should the court decide to pursue the alleged contempt, the administrative judge of Common Pleas Court is directed to assign a judge other than Judge Nahra to conduct the remainder of the contempt proceedings in the

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Footnote continued—

a court order, the terms of such order should be clear and specific, and leave no doubt or uncertainty in the minds of those to whom it is addressed.' McFarland v. United States, 295 F. 648, 650 (7th Cir. 1923). See NLRB v. Deena Artware, Inc., 261 F.2d 503, 510 (6th Cir. 1958) (order 'not sufficiently definite') and citations therein. . . ."

The prosecutor has failed to draw our attention to the specific orders violated either in his brief or supplemental brief filed after argument. The latter does demonstrate persistent questioning in the face of admonition. Query, whether this procedure reaches the requisite specificity of an order sufficient to justify a contempt finding for violation.

trial court, which judge, after giving appellant an opportunity to be heard, shall proceed with sentencing.

Reversed and remanded for proceedings in accordance with this entry.

No other error appearing in the record, this cause is remanded to the Common Pleas Court for further proceedings according to law.

It is, therefore, considered that said appellant(s) recover of said appellee(s) his costs herein.

It is ordered that a special mandate be sent to said Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

/s/ JACK G. DAY
Presiding Judge

DAY, P.J., PARRINO, J., SILBERT, J., Concur
(Silbert, J., retired, sitting by assignment)

JOURNAL ENTRY OF THE COURT OF APPEALS

(Dated May 28, 1976)

No. 34240

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA

IN RE: WILLIAM T. WULIGER
Appellant

JOURNAL ENTRY

Motion by appellant for reconsideration overruled. Exc.

/s/ JACK G. DAY
Presiding Judge

DAY, *P.J.*, PARRINO, *J.*, SILBERT, *J.*, Concur

(Silbert, Retired Judge of the 8th App. Dist., sitting by assignment.)

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated April 13, 1977)

No. 76-779

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
CITY OF COLUMBUS.)

IN RE WILLIAM T. WULIGER.

APPEAL FROM THE COURT OF APPEALS
FOR CUYAHOGA COUNTY

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the appeal is dismissed, sua sponte, for want of a final appealable order, and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

ORDER OF THE SUPREME COURT OF OHIO DISMISSING APPEAL

(Dated April 13, 1977)

No. 76-779

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
CITY OF COLUMBUS.)

IN RE WILLIAM T. WULIGER.

MANDATE

To the Honorable Common Pleas Court

Within and for the County of Cuyahoga, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Appeal dismissed, sua sponte, for want of a final appealable order.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING

(Dated May 6, 1977)

No. 76-779

THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO,)
CITY OF COLUMBUS.)

IN RE WILLIAM T. WULIGER.

REHEARING

It is ordered by the court that rehearing in this case is denied.

No. 77-426

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

Appeal From The Supreme Court Of Ohio And Court of Appeals, Eighth Judicial District, State Of Ohio

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IN RE: WILLIAM T. WULIGER

RECORD

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what occurred as to Mr. Wuliger's client.

Now, I have done my examining, and it appears that I am getting notes that there is an objection to the answers.

It appears, your Honor, that we are developing a lot of --

THE COURT: You are getting help you don't want?

MR. ADRINE: Well, if that's the expression, yes.

THE COURT: Mr. Wuliger, the examination should be confined to any relationship to your client.

MR. WULIGER: May it please the Court, when the Court indicated that we would conduct this hearing, the Court did not put that limitation with reference to this motion.

When the Court indicated that all counsel would be afforded a cross-examination of all witnesses, I didn't put that limitation on that particular aspect of the hearing.

THE COURT: Mr. Wuliger,

you seem to take advantage of every omission or failure to state fully all of the rules at every juncture of this proceeding.

I think, as a lawyer with considerable procedure, you ought to have some common sense and judgment about the rules.

You are here representing one client and, as a matter of fact, we did go over this on Friday, and you were restricted in any examination to what took place except to your client.

So, I think you are wrong on both counts. You should know better and you were told differently, and there is no reason for you to be examining the witness that has no effect on your client.

You may proceed if there is anything you wish from this witness, anything that he can offer that is of benefit to your client, or any knowledge that he has of what happened to your client with respect to this motion, you are perfectly free to ask him about it.

MR. WULIGER: Very well, your Honor.

signed. Mr. Fowler hasn't knowledge that it is a true replica of what he said, in fact, none of them have been owned by the so-called declarations of being exactly what it was that they said.

I think the Court, by reading the document, concedes that it is not couched in their language.

But moreover, it is not an original and no testimony as to custody and control, and for the other reasons which I indicated I would object to it.

THE COURT: What other reasons?

MR. WULIGER: Do you wish me to go over the reasons again?

THE COURT: No, I just think you are making up reasons, Mr. Wuliger, and I want to know what they are?

Isn't this what Mr. Fowler signed, and isn't that enough for a admissibility?

MR. WULIGER: In my judgment that is not enough.

THE COURT: Your client,

I want to show that counsel for Larry Johnson didn't share that conversation either.

THE COURT: You were not restrained.

MR. KELLEY: I was uncertain, your Honor. I started up and I noticed the Court chatting.

THE COURT: Well, I would just like to know, Mr. Wuliger, I would just like to know why you felt no compulsion to make an objection? Why did you make an objection after it was over, why didn't you make it before?

MR. WULIGER: I didn't wish to interrupt the Court.

THE COURT: Well, I appreciate the courtesy. I think that's about the first time you have shown that courtesy during this entire proceeding.

MR. WULIGER: I don't think that is really true.

THE COURT: Let's proceed, Mr. Tolliver.

with this testimony.

It seems to me I have been precluded since my subpoena has not been enforced, and the Court limited me to those police officers in connection with the other motions.

It now appears that interrogation involving my client continued past the date that those witnesses testified.

Perhaps because of their information I have filed all of the necessary motions I believe to preserve the issues, including a Brady motion, and it would be impossible for me to know all the names or any of the names of any police officers that participated in this crime of a questioning in the City Jail, of my client.

On the basis of what I have heard sitting here, and observing, so I simply indicate to the Court my reasoning for objecting to argument at this time.

THE COURT: Mr. Wuliger, every time we have a dialogue I end up hearing a speech from you, and I want it to stop. I am trying to determine the

procedure to follow here in view of some new facts that have come to the attention of the Court, and I get nothing but obstruction from you.

Now, would you care to argue the legal implications of the testimony we have heard from Mr. Jackson, and quit inserting into the record facts that aren't in the record.

So, I have not precluded you from calling your further witnesses in light of this new testimony, and I have not excused Mr. Jackson, and I merely wish to determine the legal issues which are involved in this matter and I expect your cooperation as an officer of this Court in getting to the issues in this case and not in obstructing the process of this trial as a return.

Now, would you please rise and address yourself to the issue that we have at hand.

MR. WULIGER: May it please the Court, I will make then the following

set by our Court and I don't see any reason to be changing those bonds.

I am not going to interfere with the way these men are held in jail. I did not ask that they be held in any particular manner, and I did not direcg that they be held in any particular place and I do not feel it is incumbent upon me to tell the Sheriff how to run the jail.

These problems come up very often, and the Sheriff has numerous porblems in how it handles the jail, and I must leave that to his discretion.

The motion for a ceremonial marriage will be denied, also. I may reconsider that at the conclusion of that case, if there is any jurisdiction in this Court at that time.

However, under the present circumstances, not having engaged in this ceremonial marriage for some period of time, I don't think it is proper that it be done until the time is concluded, one way or the other.

The motion to voir dire witnesses who picked persons from a lineup, or confrontation,

or to identify the Defendant in any manner from pictures, will reluctantly be granted, because I am not in trust with Mr. Wuliger's sincerity in this regard.

MR. WULIGER: Did you say it would be granted or would not be?

THE COURT: It would, yes, reluctantly granted.

The only question is, as to the procedure as to whether we will do it prior to the witness testifying or prior to the trial.

Does counsel have anything on that?

MR. WULIGER: I would strongly urge the Court to do it prior to the witness testifying, if we could manage that.

I can see no harm done doing it -- it being done at that time rather than right now.

I believe, your Honor, if it please the Court, that Rule 12E of the Criminal Rules of Procedure spell out when such a motion will be heard and determined, and it is before witnesses testify at the time of trial, but it is to be timely granted before trial.

I think because the rules spell out

MR. WULIGER: But it looked like it was like it was directed towards the defendants' side of the table.

THE COURT: I was talking to Mr. Tolliver who had made the objection. I resent your trying to pick apart every little thing that happens in this trial, and trying to make it look like there is some prejudice.

MR. WULIGER: All right, sir. Thank you.

MR. KELLEY: May it please the Court, I don't know if individual joining has to be done to preserve the record, but as counsel for Larry Johnson, I would join with defense counsel Wuliger on the objections that have been set forth.

(Whereupon an adjournment was had until 2:00 P.M., Wednesday, September 25, 1974.)

--- ooo ---

beginning, based on a conversation with you, that Mr. Hubbard was assigned to this case originally, that you were going to come in and assist him in handling the case. So I don't know what effect your statement that you are counsel of record has or what effect you are attempting to give it. The Public Defender was assigned to handle this case, and whatever your internal office procedure may be, I don't know. However, we are in the trial of this case, and it is up to you fellows to make whatever arrangements you want to be here during all court sessions.

MR. WULIGER: I will go so far to say that if my presence, if I am neglected from, neglected from -- strike that. If proceedings are had in my absence, that I believe that such would raise a serious question to effect the assistance of counsel with respect to Mr. Jordan.

THE COURT: Mr. Wuliger, are you representing to the Court that Mr. Hubbard who has handled many cases for the Public Defender's cases on his own is incompetent

counsel?

MR. WULIGER: I am not indicating incompetent counsel. I am merely suggesting in this particular case I am counsel of record, and if his presence, that is to say, that if his presence here is going to in some way involve imperfect representation, I will ask Mr. Hubbard not to be present any more throughout these proceedings.

THE COURT: Mr. Wuliger, we are in session, starting every morning at 9:00 o'clock until we adjourn in the evening, and if you want to be here, you be here. And I will expect you to be here under penalty of contempt.

MR. WULIGER: That is fine.

THE COURT: If you are not here --

MR. WULIGER: But I would appreciate it if the Court would indicate to other courts in this building that I am excused with the notion that some other lawyer, who is assisting, sitting here assisting, can proceed with the case, for me to walk in and

out of the case, and to convey an impression to the jury that I am not interested in the outcome of the lawsuit or don't have sufficient concern or interest of my client, that I can come in and out. I don't believe that effectively represents my client. I don't wish that to be the case. I am indicating I don't wish that to be the case, and I would appreciate it very much if the Court would not indicate to other courts in this county that I am available to come in and out of the case simply because I have an assistant assiting me at this trial.

THE COURT: Mr. Wuliger, I must state for the record that you have a way of twisting things that devise anybody's sense of fairness. You are the one who sent the note to me, through my bailiff, while I was on the bench, and before we adjourned for the afternoon recess, stating that you had another hearing at 4:00 o'clock. I told you you were free to go to that hearing if you wished to go to that hearing and we will continue, and Mr. Hubbard, if that was your choice, would

proceed with the voir dire examination, and handle it as he has handled examinations of several of the witnesses.

I conveyed that to Judge McMonagle after you told me it was Judge McMonagle's room that you had a hearing set for 4:00 o'clock. So that he would have the courtesy, to another Judge, who had a hearing set. You did not tell me you had this hearing set at any time prior to this afternoon, and therefore, I think it is very unfair for you to say, put this business in the record that I am proceeding in this case without you being present here. I merely informed Judge McMonagle that it was your choice as a member of the Public Defender's Office as to how you were going to apportion your time between the various cases that you are handling. I am not proceeding with this case without you, except that that is by your choice, not mine. This case has been set for trial several weeks, and you have filed motions, and made objections to any continuances, and there will be none.

We will proceed with the case as

anybody for them?

MR. WULIGER: I have asked this Court on several occasions for those exhibits to be present in the courtroom.

THE COURT: Mr. Wuliger --

MR. WULIGER: If you will consult the record, your Honor, you will see that I made that request on at least two prior occasions.

THE COURT: You know, I am having difficulty containing myself with you, Mr. Wuliger. If you want these records, why didn't you ask for them today?

MR. WULIGER: They are a part of this record of this case.

THE COURT: You expect me to sit through all of these days of trial, and make sure personally that these records are here?

MR. WULIGER: The exhibits.

THE COURT: I know what you are talking about. Why don't you ask somebody who has possession of these exhibits to have them here this morning instead of coming on the record and make it look like you have been denied

access to these exhibits.

You have responsibility, and you better start observing it.

Who has possession of those exhibits?

MR. WULIGER: I assume that they were admitted in evidence, that these are exhibits that are in the possession of the Common Pleas Court.

MR. MARINO: Your Honor --

THE COURT: The Common Pleas Court is an abstract concept, Mr. Wuliger. Who has them?

MR. WULIGER: I would assume you did, your Honor, since you had --

THE COURT: You think I personally maintain possession of these exhibits?

MR. WULIGER: I don't know where the exhibits are, Judge.

THE COURT: After five years of trial experience, you don't know who has exhibits?

MR. WULIGER: The last time I had saw an exhibit, was at the motion phase of this trial.

MR. WULIGER: I requested, if the Court --

THE COURT: Mr. Wuliger, have you asked the court reporter if he has those exhibits?

MR. WULIGER: Yes, sir.

THE COURT: When?

MR. WULIGER: Chuck --

THE COURT: Did you ask the prosecutor if he has them?

MR. WULIGER: If it please the Court, I would appreciate it if the Court would refrain from yelling at me. I have not raised my voice at the Court. I have --

THE COURT: Mr. Wuliger -- Mr. Wuliger --

MR. WULIGER: Yes, sir.

THE COURT: Answer the question that I ask. You don't tell me how to conduct myself, and I am going to find you in contempt immediately. Have you asked the prosecutor if he has the exhibits that you are referring to?

MR. WULIGER: No.

THE COURT: Has the prosecutor

TUESDAY MORNING SESSION, OCTOBER 1, 1974

(Whereupon the following proceedings were had in the Court's chambers:)

THE COURT: Mr. Marino, you have indicated that you are going to object to the income tax returns?

MR. MARINO: Yes, your Honor.

THE COURT: You want to be heard?

MR. MARINO: Yes, your Honor. I don't feel it has any relevancy to the issues at hand in this case concerning the charges of aggravated burglary, aggravated robbery, attempted murder, kidnapping. So I am making the motion, in limine, that the defense be not allowed to comment on income tax returns, and not be allowed to present income tax returns of Mr. Jackson.

THE COURT: Mr. Wuliger.

MR. WULIGER: May it please the Court, it is the contention of the defense that there was no robbery, there was no aggravated burglary, and there was no crime committed on Mr. Jackson. Mr. Jackson is engaged in a conspiracy to assassinate the men on trial.

As such, Mr. Jackson's testimony, which

indicates that he was the victim of a crime, put in issue his credibility with respect to the defense, which the defense indicates that that man is engaged in the elicit trafficking of drugs, which he denied under oath, and it is for purposes of continuing in that enterprise, for continuing those illegal activities that he had engaged in, the subterfuge of using this sham, that he calls a crime perpetrated on him, in an effort to rid himself of these men.

As a result, the income tax, since he has testified as to his income, the income tax would be relevant with reference to impeaching his testimony, and with reference to his credibility.

THE COURT: Motion will be granted.

The next item is the question of some threats having been made in this case.

Have you been threatened, Mr. Wuliger?

MR. WULIGER: I don't know if I could call it a threat. I received a phone call at my home Sunday from a man who related to me that he was Mr. Jordan's father -- my client -- and proceeded to question me, and I did not relate any information to him. However, it is the

fact that my client's father is deceased, and I don't know whether this is a threat; whether I am being informed that people know my name and my number. But I know that was not my client's father that called me. And I questioned this Mr. Jackson whether he knew anything about that phone call. He said he did not. I didn't go into it. But I have had witnesses' whose children have been threatened with reference to testifying against this man Jackson.

I have had witnesses who have indicated they were in fear of him.

THE COURT: You indicated that the defendants and other defense lawyers have. The other defense lawyers have any information about any threats --

MR. WULIGER: I don't know if anybody in the --

MR. ADRINE: I haven't received any calls.

MR. TOLLIVER: I haven't either, Judge.

THE COURT: Didn't you ask Mr. Jackson about that?

MR. WULIGER: I asked Mr. Jackson

whether he knew anything about whether he was responsible for a call I received at my home on Sunday. He did say he didn't --

THE COURT: I thought you referred to other defense lawyers.

MR. WULIGER: I may have. Off the top of my head I don't recall what my question was.

THE COURT: How about the question that you asked with respect to contracts being out on the lives of the defendants?

MR. WULIGER: I have information that he placed a $5,000 contract on the lives of the men on trial here.

THE COURT: You expect to introduce that in this case?

MR. WULIGER: Yes, I expect to do that, if my witnesses are -- will hold up.

THE COURT: Have you gone to the prosecutor with this?

MR. WULIGER: No.

THE COURT: You feel there is a responsibility to do that?

MR. WULIGER: No, I think it would be a fruitless gesture -- fruitless act in the

light of the posture of this case.

THE COURT: You mean, the prosecutor would not pursue it?

MR. WULIGER: That is my opinion, yes, sir.

MR. MARINO: First I ever heard of any of these accusations, your Honor.

THE COURT: Are you telling me that you are going to have witnesses to come in here, and are going to testify that they have knowledge that Mr. Jackson has put out a $5,000 contract on each of the defendants?

MR. WULIGER: I am going to put on witnesses that are going to testify that that is what they heard.

THE COURT: That is what they have heard?

MR. WULIGER: That is right.

THE COURT: Mr. Wuliger, you know that is not admissible evidence.

MR. WULIGER: Your Honor, I don't have any witnesses who were there when Mr. Jackson did this. All I know that the word on the street is that he has put out a $5,000 contract on the lives of these four men.

THE COURT: You expect me to permit evidence from the prosecution of what has been heard on the street?

MR. WULIGER: No.

THE COURT: And you expect me to admit it from your side?

MR. WULIGER: All right, I won't put that evidence on. I asked this man the question. He has denied it.

THE COURT: You could ask any witness whether they have threatened the life of somebody; against you --

MR. WULIGER: Yes.

THE COURT: You think that is a fair tactic?

MR. WULIGER: Yes.

THE COURT: Without proof?

MR. WULIGER: He has denied it. I didn't do it out of the clear blue sky. I did it with some information that this has been done. Whether this information is admissible in a court of law isn't the question. The question at issue, I had some information related to contracts put out on the lives of the four men on trial here. I believe that I have a right to question the

witness whether or not he did -- that I don't have admissible evidence. You are saying that the word out on the street is not admissible evidence in this case. I can't bring in the people that he contracted with or the people that he entered into that agreement with. I can't do it because it is hearsay, but I certainly didn't base the question out of the clear blue sky. I had some information, and I don't consider, since I had information, I don't consider that irresponsible or improper.

THE COURT: If it was done against you though you would think otherwise?

MR. WULIGER: I haven't said that. If they have information --

THE COURT: It would be all right for the prosecutor to bring in here that these fellows threatened to kill Mr. Jackson if he hears that somewhere -- some police informant -- brings that information back to the prosecutor, are you going to feel that is not irresponsible for the prosecutor to then ask them if they take the stand?

MR. WULIGER: I am not going to comment on that because I don't know the circumstances

around that.

THE COURT: I just gave you the circumstances.

MR. WULIGER: Well, if they had information that my clients were threatening the lives of somebody, and they questioned, isn't it a fact that you threatened the life of the prosecuting witness, and my client answered, "No", and that was the end of it, and they had information to sustain that. There is probably nothing wrong with the question.

MR. MARINO: I think there would be, your Honor. I think you would have to have viable information that that is admissible information, that it actually had occurred.

In light of what Mr. Wuliger has said, I am going to make a motion that -- I am not quite sure, your Honor, I am not quite sure how to state this because the implications are already before the jury. In light of what Mr. Wuliger said, there is nothing to erase it from their minds, and there is no way of me knowing, your Honor, when Mr. Wuliger expects -- whether or not he had that information. It is a matter of trust.

THE COURT: That is the whole

point. I think it is very improper, it is entirely improper to ask a witness a question that implies something that you are not going to later be able to introduce evidence on.

MR. WULIGER: Your Honor, I was hoping some of these witnesses would indicate exactly what their sources of information were on the stand. But I am not -- I am not naive, I know what is going on in this trial, and I know what is involved in this lawsuit and whether or not people are going to stick out their necks when they believe that the law, the viable law in this community is represented by Jackson, and not by the prosecutor's office. I have got witnesses that believe that his law is more viable than the law in this courtroom or in the law in this community.

THE COURT: You are also going to have evidence that Detective Copeland takes money from this man?

MR. WULIGER: I hope to have that evidence, yes. Again, your Honor, these acts aren't done -- I don't wish to be limited in my cross-examination -- I contend that there are two members of the East Cleveland Police Department

that I have informazion are in the pay of this man, and that there is at least, at least one and probably more than one who are in his employ on the East Cleveland Police Department, and that this is not news to people on the force of either departments. Now, whether or not these people are going to admit on the stand or not, I certainly intend on cross-examining on, and if I can get some admission, I am going to.

MR. MARINO: Your Honor, I think the issues that Mr. Wuliger is posing can better be presented during his own case by the same witnesses. To raise these implications on cross-examination of a State's witness is highly improper unless he can present it.

He can just as easily put an individual on the stand saying that Andrew Jackson threatened the lives of those men on his own case rather than have Mr. Jackson answer that question on his own cross-examination. I think it is highly improper that these questions are coming out, and there is nothing the State can do to erase it from the jurors' minds.

MR. ADRINE: How do you prove a threat if it comes to you by the way of innuendo,

by the way of someone passing it to you? How do you get it? How do you do it?

MR. MARINO: Evidence.

MR. ADRINE: You have to wait until somebody does it to you? I mean -- I live in the streets, so to speak. My office is in the ghetto, and this is a real fear when it comes to narcotics, a real fear. We just had another one picked up in the lot last night with eight bullets. So, I don't know, how do you do things like that? I mean, I know it is highly improper, but when you start dealing with narcotics, you are dealing with somebody that walks up to you and holds you up.

MR. KELLEY: I think the best answer is what Mr. Wuliger did yesterday. I think right now if any threats was emminent, that Schoolboy would become his best protector because this record now reflects that there was a mention of that, and he is going to see that nothing happens to him now. I think the best step has been taken.

MR. WULIGER: It happened to me once before. It involved an associate of Mr. Jackson, Henry Jackson, who is reputed by federal drug

enforcers to be linked with this man, and being one of the largest drug dealers in the community, who also conveyed to me a threat without saying you are threatened. And he and another man approached me in the courtroom when I was trying a case involving drugs, and I again brought it immediately to the attention of the Court, right in open court, like that.

My name is no secret. I have a family. I am as vunerable just like any man in this room, and it may have been no threat, it may have been a mistake. It may have been nothing. If this man wasn't responsible for it, fine. It may be I am over-sensitive.

When I get a call that somebody portrays to be the father of my client when my client has no father -- his father is deceased -- I don't know what to make of that call.

THE COURT: That is just the point. You brought it into this trial, and suggested to the jury that this man has called you, and threatened you.

MR. WULIGER: I have not --

THE COURT: You brought it in, suggested to the jury that this man has put out

contracts on the lives of the defendants, and threatened defense lawyers in this, and is responsible for the killing of some other people.

MR. WULIGER: Well, that, you can talk to the police. They will indicate the same thing to you.

THE COURT: All of those items have been introduced here, and if I understand what you are saying here, you are not able to produce any credible or admissible evidence to that effect in this trial. You have interjected all of those issues into this case.

MR. WULIGER: I believe that I can introduce evidence which would warrant that conclusion on a circumstantial basis. What I can't do is perhaps introduce direct evidence, but I believe I can introduce evidence which could be considered by way of inference that these things are going on.

THE COURT: That Mr. Jackson has threatened somebody?

MR. WULIGER: Yes.

THE COURT: And that Mr. Jackson has put contracts out on the lives of the people, and -- wait, Mr. Wuliger, just one minute now.

I am not going to permit you to evade the direct answers to these questions. Are you going to introduce any testimony that Mr. Jackson put out a contract on the lives of any of these defendants?

MR. WULIGER: I can't say for certainty at this time that I will do that, and I can't say for certainty that I won't do it. I hope to have that evidence.

THE COURT: Do you have any such evidence now?

MR. WULIGER: I have no evidence now that anyone was present when Mr. Jackson issued such a contract. I have no direct evidence on that.

THE COURT: Do you have any evidence that Mr. Jackson called you?

MR. WULIGER: No.

Your Honor, you said the motion was granted. Which motion were you referring to?

THE COURT: The motion to exclude.

MR. WULIGER: You were granting the prosecution's motion?

THE COURT: Exclude income tax records of Mr. Jackson.

MR. TOLLIVER: Oh, Judge, my God.

MR. WULIGER: I don't know. Did the Court realize that he did not bring those records into court today?

THE COURT: I have no knowledge or information.

MR. MARINO: I told him, your Honor, I told Mr. Jackson to call his accountant, and he did, and his accountant called his attorney, Mr. Robinson. Mr. Robinson said that if the records were ordered in by the Court he would be glad to present them. But evidently his accountant is not available.

MR. TOLLIVER: Judge, can I be heard on that?

One of our defenses to this lawsuit is that this man is living above his legitimate means.

THE COURT: Now, Mr. Tolliver, let me stop you right there. I don't know how that would be a defense to this lawsuit.

MR. TOLLIVER: I didn't get a chance --

THE COURT: The most it would be is an attack on his credibility.

MR. TOLLIVER: That is what I was getting at too.

THE COURT: It is not a defense of this lawsuit, but an attack on his credibility. There are limits of what you can do in attacking a man's credibility.

MR. TOLLIVER: Let me say this, Judge. This is not a typical lawsuit, as the Court well knows. This man has said that he is possessed of three Cadillacs, a motorcycle, and property, large amounts of cash, diamond rings, and I think the jury should know his source of income. Maybe he can substantiate it, which will help the State, and then if he can't substantiate it, it will help the defense, and if we are here for the truth, and I think that is what we are here for, then how is it going to hurt the State or the defense? That the jury sees what he claims to be his legitimate income.

MR. MARINO: Your Honor, is Mr. Tolliver arguing that if the defense proves that Mr. Jackson is a dope pusher, that they have a right to rob him?

MR. TOLLIVER: No. No. See, you are going far afield. The claim, as has already been made by these defendants to the police, that this was their reason.

MR. MARINO: That what?

MR. TOLLIVER: That they suspected he was a dope pusher, and that they knew he was a dope pusher.

MR. MARINO: If that is true, they have the right to rob him?

MR. TOLLIVER: That is not the issue.

MR. MARINO: That is not the issue?

MR. TOLLIVER: You are going off on a tangent. The only thing is, we questioned this man about his income, where he gets it, how much he makes, and where it is derived from. Now, if he is a legitimate businessman, as he says he is, then he shouldn't have any hesitation to let the jury see it. That helps you. If he isn't, that helps us.

MR. WULIGER: Credibility is part of it.

MR. TOLLIVER: The credibility is all we are asking.

THE COURT: Gentlemen, I have ruled that we are not bringing in all of this evidence on collateral issue of credibility.

Let the record show Mr. Tolliver's objection. Credibility has been amply gone into,

and in fact as we have brought out here in this discussion this morning quite unfairly impunged.

MR. WULIGER: But the Court is saying that we can't bring in evidence which would be admissible because it is collateral, and we can't bring in evidence which is not admissible because it is hearsay with reference to it. In other words --

MR. KELLEY: The jury has been told --

THE COURT: I have ruled we are not going to bring in income tax returns to show this man's income or lack of income.

MR. TOLLIVER: Well, the jury will get the impression then as Mr. Wuliger has requested him about his income tax statement, and asked whether or not he will bring it in.

THE COURT: Are you asking me to tell the jury that I have excluded the income tax returns?

MR. TOLLIVER: Yes, Judge.

THE CLERK: I certainly will.

MR. TOLLIVER: So at least we know we didn't throw up a smoke screen, and didn't follow through with it.

MR. MARINO: Your Honor, I would ask the Court what it intends to do about the questions asked by Mr. Wuliger.

THE COURT: What do you suggest I do, Mr. Marino? Instruct the jury the same way?

MR. MARINO: That the questions were improper.

THE COURT: Pardon?

MR. MARINO: That the questions were improper.

MR. TOLLIVER: He can say that to the jury.

THE COURT: Why not, Mr. Tolliver?

MR. TOLLIVER: Because if they were improper, objections having been made, the Court would sustain it.

MR. MARINO: I think the Court ought to tell the jury exactly what took place in this room. That the questions were improper, that the defense has no evidence that they could have presented on the questions, and that they --

MR. WULIGER: That is not true. The defense has evidence that the Court is going to rule that the hearsay is not admissible --

THE COURT: Wait a minute, Mr.

Wuliger. Let's not play games with words. You realized long before you asked those questions that hearsay is not admissible.

MR. WULIGER: I realized long before I ask those questions I have a right to effectively cross-examine a witness that takes the stand, and if I have information --

THE COURT: Do you still maintain that is proper?

MR. WULIGER: I maintain that I did nothing improper. I maintain --

THE COURT: Your sense of propriety leaves a great deal to be desired, Mr. Wuliger.

MR. WULIGER: Maybe instructions made to the jury, it should accurately reflect --

THE COURT: I am going to instruct the jury that you have no evidence to be presented to this Court to substantiate the suggestions contained that Mr. Jackson threatened you or had contracts out on anybody.

MR. WULIGER: Why don't you say to the jury that you aren't going to permit any evidence with reference to what people have heard on the street.

THE COURT: Because that is not

evidence. Very clearly it is not evidence.

MR. WULIGER: All right. May it please the Court, then I am going to move for a mistrial with reference to these instructions, and I also like to make another motion for a mistrial with reference to identification that has come out of this man's mouth.

Before we commenced this trial, I asked for rulings on all motions. Now, when we have a voir dire of the identification process of this witness --

THE COURT: What is your motion, Mr. Wuliger?

MR. WULIGER: I am moving for a mistrial, your Honor. We had a motion for a voir dire identification. The question was whether or not there had been any taint involved in the identification process of these three defendants.

At that time, Mr. Marino stipulated that there had been, and that there would be no in-Court identification. However, the Court didn't rule that there would be no in-Court identification, and because there had been no ruling, there has been in-Court identification of my client and several of the other defendants, in

addition to the Boshoen who he was permitted to identify, in open court.

On that basis then we would move for a mistrial.

THE COURT: Motion is denied.

Mr. Jackson, you had given him the chance to testify, very clearly said that he can identify your client because your client identified himself to him, and permitted that identification or that confrontation was not excluded.

The other motion is denied also.

MR. ADRINE: May I ask a question here?

THE COURT: Yes.

MR. ADRINE: If a question is not properly objected to, and it is allowed to go in or it went in without objection, now, can the prosecutor now come back and object to a question which he failed to object to, which might have been irrelevant, immaterial, it is in the record, and there is no objection. I think case law shows that when you sleep on your objection or that you do not take advantage of it, that you are in effect waiving it. And if you waive it, it goes into the record, but you can't come back

later and claim, hey, I didn't object, but it is still objectionable.

I think the Court of Appeals has held that even when a defense lawyer fails to object where he should object, and the information is allowed in, whether it is hearsay or otherwise, that it is in, and because the objection is not timely made, it stays.

MR. MARINO: Your Honor, I am assuming when the defense lawyers ask a question to a witness, especially on cross-examination, that they have some evidence to back it up, such as the question Mr. Wuliger asked Mr. Jackson about.

Is it a fact that you put out a contract on the lives of these men, and I am assuming he has some evidence to that effect.

THE COURT: If any lawyer in this case doesn't realize it, that is a necessary foundation to asking that type of a question, realize it from this point forward.

MR. KELLEY: Your Honor, I would like to suggest or ask the Court to consider, instead of telling the jury these were improper questions, to at least couch it on the condition

that unless it is proven, that what Mr. Wuliger has indicated right now, he may not be able to pin this down, but during the course of this trial, anything could happen.

THE COURT: Yes. You don't ask the question on the basis that anything may happen, Mr. Kelley, and apparently you haven't been present throughout all the discussions we have had here. You don't shoot first, and ask questions later.

One other item, gentlemen. The sheriff has rules which these deputies have to enforce.

I received no cooperation from the lawyers in this case in this regard, and I expect it from this point forward.

MR. TOLLIVER: In what respect, Judge?

THE COURT: In respect that there is not to be no contact between the prisoners and any witnesses or anybody else. There is not to be no body contact.

Now, the sheriff deputies informed me that they are being abused by these men. That they are, they have instructions not to have contact with their relatives or whoever it is.

That they insist on having it in any event, and went so far, apparently, as one of these fellows, your client, Mr. Tolliver, apparently did take a swing at Mr. Jackson yesterday, and I am going to have to take some very stringent measures unless this is brought under control.

Now, you fellows know that this trial, despite the fact that there are all kinds of overtones, I have tried to conduct this trial as I conduct any trial. I have resisted all efforts that have been made to have people searched, to get into all kinds of sheriff security here or we are going to have to do that, unless there is some cooperation evidenced by the other side of the table, which is your side.

MR. ADRINE: Your Honor, I have instructed my client, but even after instructions, and I think all of us have, but it is difficult to control an individual unless you go and grab him by the arm, and if you go and grab him by the arm, then you are creating a lot of animosity.

Now, I have asked my client to remain seated with me, and Mr. Kelley has. Mr. Tolliver has.

MR. TOLLIVER: That is right.

MR. ADRINE: And Mr. Wuliger, and Mr. Hubbard. I know this to be a fact. But --

THE COURT: Have you all asked your clients to do that?

MR. TOLLIVER: No question about it.

MR. ADRINE: I have.

THE COURT: Mr. Wuliger?

MR. WULIGER: I don't know if I have or haven't, Judge. I know my client is not, in my judgment, hasn't created a disruption in the courtroom.

MR. TOLLIVER: My man is difficult, Judge, and I will be very honest. He is difficult because he feels that, as he has told you, that he is being tried for something that he didn't do, and he is just frustrated. The balloting of the Grand Jury indictment against him for a murder situation, he has some basis for his frustration.

So we will do the best we can, Judge, to try to control.

THE COURT: All right, Mr. Tolliver. You tell me that you have done the best you can or if that is what you are telling

me, make one more effort. I just hate to have to have it come to the deputies restraining these men.

MR. TOLLIVER: Let me say this to the Court, Judge. I have recognized, and appreciate the fact that you have to have decorum in the court, and you know, and you and I have no argument on that. I just want the Court to understand the frame of mind of the person I am dealing with.

THE COURT: I understand that. But we are not going to make rules for him, and I am not going to tell the sheriff deputies that all of the rules that they have learned and that they have to enforce in every other trial are going to be waived in this trial.

MR. TOLLIVER: Let me say this, Judge. You have to understand that it is the old double standard that this Court has nothing to do with. That if he was overcharged he was charged with things he didn't do. He doesn't have the money to get out on bond. He is forced to stay in jail, because for things he is not guilty of, and naturally is hostile, to say the least.

THE COURT: I understand he is

hostile, and you and I have been around, and you have been around enough to know that sometimes that an innocent man is hostile, and a guilty man is hostile, and that is why we are here to determine whether he is innocent or guilty.

MR. TOLLIVER: He knows whether he is innocent or not, Judge. At least from the nolleing of the first-degree, that at least that impression seems to be a legal correct one, and if you will give me some time to talk to him, Judge, I will certainly try to do my best. I just wanted you to know why he is hostile, which I am sure you can appreciate it, because the prosecution even admits, and I appreciate Carmen's candor on that, that he was over-indicted, you know, to say the least.

THE COURT: The Court will rule on that when the time comes. I don't know what the circumstances are going to reflect here. I don't know what the situation is going to be. I don't want you to operate under a false assumption though that it necessarily means that all of these counts are going to be excluded if he is proven to have been in on the original Jackson robberies, and he is lost somewhere in the scuffle. We will

hear argument on what that means.

MR. WULIGER: Your Honor, there is one other ground for mistrial. That is the fact that the Court is not -- we have subpoenaed how many people, Richard?

MR. HUBBARD: I believe it is seven or eight.

MR. WULIGER: Seven or eight people from penal institutions, one of whom I have a signed statement to our office with reference to purchasing drugs from this man Jackson.

The Court is refusing to sign those subpoenas so that those subpoenas will be issued based upon the fact that we are not being permitted to have our subpoenas issued, and bring people back here. Some of those people, I believe, have information relative to threats made on the lives of the defendants, and other information relative to this man's drug dealings. These names are Denise Peoples, Ronald Smedley, Roger Stone, George Jackson, Jerry Scruggs, George Heinz, Dan Howard, and there is an additional lady at Marysville who -- maybe that is Denise Peoples.

In any event, these are people that we have subpoenaed, that Mr. Hubbard brought to the

Court's attention the subpoena information, who indicated that they would be required for part of the defense, and the Court refused to sign the subpoena. We move for a mistrial.

THE COURT: The motion is denied. So the record is not marred by further misstatements, Mr. Hubbard was asked specifically the purpose of these witnesses, and he indicated it was to attack the credibility of Mr. Jackson.

The Court excluded it on the ground, being unless Mr. Hubbard provided me with a brief to show the Court was incorrect in that ruling.

(Whereupon a recess was taken.)

(Whereupon the following proceedings were had in the courtroom with the jury not present:)

THE COURT: Let the record show that as court was convened this morning, the defendants were brought into court, there was a scuffle between all of the defendants and the deputies.

MR. JORDAN: You call it what you want.

THE COURT: You can explain it.

For one thing, it describes Asa Harris. Says that he punched Schoolboy Jackson in the hallway. It says that --

THE COURT: What does that mean, that it didn't happen?

MR. WULIGER: I am saying this was Schoolboy's version of what happened. I don't know what Harris' version of that incident was.

THE COURT: I thought you checked with the defense.

MR. WULIGER: That they didn't check with any of this information to the news media.

THE COURT: All right.

MR. WULIGER: It also indicates in here that the Press learned that this case was moved up. That the no contact rule was partly because of a rumor, that one of the spectators, most of them robed in, and members of the same Muslim sect as the defendants might try to pass a weapon to a defendant.

Then it goes on to describe Harris, 24, of Toledo, apparent leader of the four --

THE COURT: Mr. Wuliger, I can read the article. What is your point?

MR. WULIGER: Then goes on to describe

Harris as apparent leader of the group. A version of the case that the State wishes to put forward to this jury. Not a version that the defense has maintained, and in fact, in our opening statements said something to the contrary, Mr. Harris wasn't involved in this.

Now, I observed the Court discussing with Mr. Bergen in chambers after the incident. The Court was in chambers with Mr. Bergen.

Now, I don't know whether this version of these events came from the Court or not. I am at this point attempting to discover, and ascertain whether or not the Court discussed this case with Mr. Bergen yesterday, and that is the purpose of putting this on the record at this time, so that we can ascertain the source of this type of version of what went on, and at that, after we have ascertained that, to determine what we are going to do about it.

THE COURT: Mr. Wuliger, I do not expect to be cross-examined by you during the course of this trial and that I would suggest you refrain from making such request.

For your information, I did not discuss this case with Mr. Bergen, and I did not discuss

family?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Does Mr. Jackson ever get angry?

THE COURT: Sustained.

The Court is making an objection to this line of questioning, Mr. Wuliger. Let's get the questions relevant to what happened that night or the witness' credibility. Not the credibility of Mr. Jackson.

MR. WULIGER: All right, your Honor.

Q Have you ever seen, have you ever been afraid of Mr. Jackson?

MR. MARINO: Objection.

A No.

THE COURT: It may stand.

Q Have you ever seen Mr. Jackson --

THE COURT: What was the answer, please?

THE WITNESS: Yes.

THE COURT: The answer to the previous question, I think he asked you if you were afraid of Mr. Jackson.

THE WITNESS: No.

THE COURT: Next question, Mr.

Wuliger.

Q The next question was, have you ever seen him angry?

A Yes, I have seen him angry.

Q Have you ever seen him violent?

A No. Yes, yes, I have.

Q You have. Now, have you ever known -- have you ever observed Schoolboy shoot somebody?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Do you know a man named Louis Sanders?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Do you know a man named Louie Soliver?

MR. MARINO: Objection.

THE COURT: Sustained.

Q You don't know him any more, do you?

THE COURT: Mr. Wuliger, I caution you, make the questions relevant.

Q Now, you indicated that you paid the rent, you pay the utilities in that house. Would you mind telling us what your rent is?

A $115 a month.

Q And what would your -- say electric bill a month be?

A About $26.

Q Now, have you been present in this home on 4th Street when police officers have come in and out of that house prior to this?

A No.

Q And if one of the -- if Anthony Lane, if I were to tell you that Anthony Lane has testified that he has seen police officers coming in and out of that house on prior occasions, would that change your testimony?

A No, it wouldn't.

Q Now, what would you say your gas bill is a month?

A $32.

Q About $32. Does Mr. Jackson entertain friends in your home?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Do you have a telephone there?

A No.

Q No phone. By the way, did you know that there was going to be a jury view at your home? Did you know that?

A Yes, I knew it.

Q And who told you that?

A Andrew.

Q Andrew told you that?

A Yes.

Q And those cars that are usually parked in the

vacant lot across your lot, do you know who moved those cars?

MR. MARINO: I object, your Honor.

THE COURT: Sustained.

Q Well, do you know whether or not -- strike that.

Did you clean up the house before the jury came?

A I clean up every day.

Q Okay. And do you know whether or not Andrew had those cars taken away from the lot across the street?

MR. MARINO: Object to this line of questioning, your Honor.

THE COURT: Sustained.

Q Do you know a man named Jimmy Drake?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Do you know Elvie Drake?

MR. MARINO: Your Honor, may we get to the issue in this case? I am objecting.

THE COURT: Mr. Wuliger, you are so instructed.

MR. WULIGER: Your Honor, the name Jimmy Drake appears on all the police --

MR. MARINO: Object to in-Court comments, your Honor.

THE COURT: Direct your questions

to what happened that night, Mr. Wuliger.

Q Do you now or have you ever usednarcotic drugs?

A No, I never have.

Q No?

A No.

Q Do you know what a Jones is?

A Yes, I know.

Q What is a Jones?

A It is when you are addicted to drugs.

Q Now, on the 29th day of May, do you recall what time you got up that morning?

A About 10:00 o'clock.

Q And were the children at home when you got up?

A Yes, they were there.

Q And who were the children?

A Who were the children?

Q Yes. That were home when you got up.

A Natasha, Alexander, Paulette, and Andrew.

Q What about Anthony, was he up?

A He wasn't there.

Q He wasn't there?

A No.

Q What about Kenny, wasn't he there?

A I don't believe so.

Q Okay. And where were the children when you got up?

MR. MARINO: I object to this line of questioning, not relevant to the issues in this case.

THE COURT: Sustained.

We will take a short recess at this time, ladies and gentlemen. Please don't discuss the case amongst yourselves or with anyone else. Don't permit anyone to discuss the case with you. Don't form or express any opinion about it until it is submitted to you for deliberation.

(Whereupon the jury was excused.)

(Whereupon the following proceedings were had outside the hearing of the jury.)

THE COURT: Please be seated.

Have everyone seated, deputies. Everyone, please, be seated.

Mr. Wuliger, the Court has directed you on several occasions to make your --

MR. ADRINE: Your Honor, is the witness allowed to stay here?

THE COURT: You can be excused. Will you step outside, please.

Mr. Wuliger, the Court has directed you

on several occasions to make your questions relevant. Any explanation as to why they are not?

MR. WULIGER: Your Honor, these questions bear on the witness' bias, credibility, and is proper cross-examination, proper scope of cross-examination.

The curtailing of counsel, both myself, and Mr. Kelley, with reference to the cross-examination, I believe, has denied these defendants their rights to an effective assistance by counsel, and Fifth Amendment right to confront, and cross-examine their accusers, and we would move for a mistrial. I believe every question asked was proper.

THE COURT: Including the question, what time she got up this morning?

MR. WULIGER: Yes, it bears upon her ability to reflect and recall the events that she is testifying from the events of her recollection on the 29th of May, and I think this is perfectly proper to recall those events by asking her questions with reference to it.

Moreover, I think that to allow questioning on that will develop inconsistencies in her testimony.

THE COURT: Mr. Wuliger, explain your disregard of the Court's instructions that you get down to the issues of what happened that evening.

MR. WULIGER: I believe, your Honor, that I am getting down to the issues of cross-examining this witness. I believe that I have properly cross-examined this witness.

THE COURT: All right. One other subject matter, Mr. Wuliger. You asked a series of questions concerning whether Mr. Jackson was violent, is that right?

MR. WULIGER: Yes, sir.

THE COURT: And then you capped it off with a question about whether she knew a certain person, and then whether she knew him any more.

MR. WULIGER: That is correct.

THE COURT: What was the inference pertaining to this question?

MR. WULIGER: That the man is deceased, your Honor.

THE COURT: Yes. And the inference is that Mr. Jackson killed him. That is what you are trying to get to the jury?

MR. WULIGER: He did kill him.

THE COURT: Has he been charged, and convicted of that crime?

MR. WULIGER: He hasn't been convicted of that crime.

THE COURT: We had a discussion about this in chambers yesterday, did we not?

MR. WULIGER: Yes, sir.

THE COURT: And you were clearly instructed too, that this is improper cross-examination?

MR. WULIGER: We didn't discuss this particular incident, but this situation, this woman knew about, and it bears upon whether or not she is afraid of this man, and she knew --

THE COURT: Mr. Wuliger, you have been instructed clearly that you are not to bring collateral issues into this case, have you not? And specifically, collateral issues about whether somebody else has committed crimes for which they have not been convicted?

MR. WULIGER: Your Honor, if a witness is afraid, and if she was in bed with a man who is now deceased, and that man is now dead --

THE COURT: I asked you whether

you had been instructed as I have just indicated.

MR. WULIGER: Your Honor, I believe it is not collateral if a person testifies --

THE COURT: I asked you if you have been instructed as I have just indicated, not what you believe, Mr. Wuliger.

MR. WULIGER: Whatever the record reflects my instructions have --

THE COURT: Do you recall being instructed that way?

MR. WULIGER: I recall with reference to the fact that the Court wouldn't allow me to bring in witnesses saying that they were collateral with reference to purchases of drugs, but I don't recall with reference to cross-examination. But if the record reflects it, then it occurred.

THE COURT: Your memory is a little short about what happened just yesterday, is it not, Mr. Wuliger?

MR. WULIGER: Well, your Honor --

THE COURT: I find you in contempt of this Court, Mr. Wuliger, for improperly bringing inferences before this Court that you know are improper, and I expect it to stop.

Sentence will take place at the close

of this trial.

MR. WULIGER: If it please the Court, I would appreciate it if the Court would sentence me now.

THE COURT: You have a trial to complete, Mr. Wuliger, and I expect you to do it despite everything that you have done to try to cause a mistrial in this case.

(Whereupon a recess was taken.)

(Whereupon the following proceedings were had outside the hearing of the jury:)

THE COURT: Please be seated.

The complaint has already been made the first thing this morning about publicity with respect to this case by Mr. Wuliger, and as I remarked at that time, I personally observed that one of the defense lawyers giving an interview on television last night.

So, in view of that, and in view of the fact that the defendants were being interviewed by the media during the recess here, by the media, the Court is going to impose the following rules for the rest of this trial. There will be no media

interviews of the defendants during court hours, and in and about the courtroom.

Counsel will not give any interviews at any time with respect to this case.

Any questions about that from counsel?

MR. JORDAN: Why don't you tell, put it in this record, you were telling the news media in your chambers.

MR. WULIGER: Your Honor, may the record reflect that the prosecutors are not present in the courtroom.

THE COURT: That is my mistake. The prosecutors should have been summoned, and I didn't realize it until it was called to my attention. The rule, of course, applies to them, and I will make sure as they are brought back here, that they are so informed.

MR. KELLEY: Your Honor, I would like to ask the Court to consider the aspect of the releases to date, and whether or not the jury has read and have been informed of these articles.

THE COURT: There have been no releases to date unless you have made them.

MR. KELLEY: There are the articles of yesterday's press.

MR. MARINO: N-a-t-s-h-a, your Honor.

MR. WULIGER: Would the Court permit us to proffer in the record the previous witness' testimony with reference to cross-examination?

THE COURT: Cross-examination as to proffering is improper in cross-examination, as you know, Mr. Wuliger.

MR. WULIGER: Should I put in the record my question?

THE COURT: You put in the record the question relevant to this witness.

MR. WULIGER: I had requested the Court to ask the witness what the word truth means, and a line of questioning with reference to truth. I had requested the Court --

MR. MARINO: Would the defense attorney speak up, please?

MR. WULIGER: I have requested the Court to ask the question, with reference to discussing this girl's testimony with her mother. Okay.

THE COURT: The Court has ruled those questions may be proper. The second question may be proper on the examination of the witness in

asked her when I interrogated her earlier if she had a criminal record, and I believe she said she had been convicted of something, and I have to say it slipped my memory. I did not ask her on direct examination.

A few minutes ago we were talking it over in the courtroom here, and Detective Farmer reminded me that I have been made aware of it, and that I forget my mind, I still don't recall, your Honor. I have nothing in my files to indicate that she does have a record. But --

THE COURT: You have information that her record is anything more than she indicated it was, Mr. Wuliger?

MR. WULIGER: I would request permission to see her.

THE COURT: I asked you a question, Mr. Wuliger, and I expect an answer. I don't banter wisely, like the wording that you have been conducting throughout the trial. I want an answer when I ask you a question.

MR. WULIGER: I had no prior contact with this witness, and I have no --

THE COURT: That is not what I asked you either. I said, do you have any evidence

that right?

A Yes.

Q And you expected that somebody was going to open up on you?

A Yes.

Q And therefore it was important as you turned and looked to observe what it was, that you could observe, is that right?

A That is correct.

Q And you were conscious at that time of the importance of what was going on around the house, that is how you noticed the flashes, and windows breaking, is that right?

A That is correct.

Q You weren't concerned -- strike that.

And that is why you didn't duck, because if you ducked, you couldn't have seen all of this?

A If I had ducked, I wouldn't have seen it, right.

Q Officer, have you ever participated in an arrest where the suspect did not get back to the station alive?

MR. MARINO: Objection.

THE COURT: Sustained.

MR. WULIGER: Nothing further.

MR. MARINO: I have a few questions, Your Honor.

REDIRECT EXAMINATION OF KEITH REIDER

BY MR. MARINO:

Q Officer, do you recall when you ran to your car, do you recall that incident?

A Yes.

Q Do you recall if you were ever tripped or stumbled over anyone?

A Not to my knowledge.

Q When you got to your car, you said you turned and faced the building, is that correct?

A That is correct.

Q Now, did you stand there a long time or did you just turn around?

A It was a very short time. Almost simultaneously reaching the car, turning, I saw the firing and I realized that I was shot.

Q The next thing you were on your back, is that correct?

A That is correct.

Q Now, you know that you were hit in the arm. There is a slug in your arm, is that correct?

A That is correct.

Q They took a piece of metal out of your chest. You know something hit you in your chest?

A Right.

Q Now, the wound to your neck, do you know what kind of wound that was?

A No. Just that something passed across the Adam's apple, over.

Q You say passed across. Did it enter your neck or exit?

A No. It grazed skin crosswise.

Q Did you require stitches there or anything?

A No.

Q You said that no one else was shot before you. Do you know if anyone else was shot before you?

A I don't know positively that no one was or was not prior to mine.

MR. MARINO: Nothing further.

RECROSS EXAMINATION OF KEITH REIDER

BY MR. ADRINE:

Q Sir, if you don't know whether you were the first person shot, you don't know whether any shooting took place before you were shot then, do you?

A I believe I was the first person shot.

Q But you say you don't know?

A Positively could not say. I could say I was first.

Q I see. Now, sir, you and other officers were placed there to secure the area, is that right?

A Yes.

Q And to stop any suspicious movement?

A To check any suspicious movement, yes.

Q All right. And a person running or people running would be suspicious, would they not?

A Uh-huh.

Q And unless you could identify those persons, you would have persons who were going through some type of suspicious movement, right?

A Yes.

MR. ADRINE: Nothing further.

THE COURT: Anything further?

MR. KELLEY: Nothing further, Your Honor.

MR. TOLLIVER: Just one question, Judge.

RECROSS EXAMINATION OF KEITH REIDER

BY MR. TOLLIVER:

Q My understanding of the question propounded to you by Mr. Wuliger, that you did see a car come through there and didn't stop?

A The Alvarez car.

Q The Alvarez car?

A Yes.

Q That is right?

A Right.

Q Now, so those two cars were the only two that came through there at that particular time?

A At that particular time, yes.

Q You saw no persons running?

A No. No.

Q Or acting suspiciously?

A No.

Q Is that correct?

A Yes.

MR. TOLLIVER: I have nothing further, Your Honor.

MR. WULIGER: Just have a couple of questions.

RECROSS EXAMINATION OF KEITH REIDER

BY MR. WULIGER:

Q Officer, today is the first time you have been down to talk to the Prosecutor in connection with this case, is that right?

A Yes.

Q And you were in their office talking to them about this case this morning?

A I was in their office, yes.

Q And you were also in their office at the recess, were you not, sir?

A Yes, I was.

Q Were other members of your department there when you discussed this with the Prosecutors' office, the Prosecutors?

A At which time?

Q Well, let's start with this morning.

A Well, this morning, Captain Williams, Sergeant Nagy, myself, all three of us reported to the Prosecutors' office.

Q And at the recess, who was in there?

A One Prosecutor and myself, and I believe members of the Cleveland Police Department.

MR. WULIGER: Nothing further.

THE COURT: Thank you, Officer.

You may step down.

Call your next witness.

MR. BARKAN: Sergeant Nagy.

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A Then on the scene, I secured my two men, and we went back to the station.

Q And did you have any further involvement after that?

A No. That was it.

MR. BARKAN: Okay, Sergeant. Thank you very much.

THE COURT: Ladies and gentlemen, thank you. We will adjourn for the day at this time. Remember, our next session will be on Tuesday morning at 9:00 o'clock. In the meantime, enjoy the long weekend. However, do heed the Court's admonition at all times. Don't discuss the case amongst yourselves or with anyone else. Don't let anyone discuss the case with you. Don't read or look at or listen to anything about this case. Keep your minds free to decide this case on the evidence that is presented in the courtroom.

We will adjourn until 9:00 o'clock Tuesday morning.

(Thereupon, the Jury was excused.)

(Thereupon, the following proceedings were held outside the hearing of the Jury.)

THE COURT: Please be seated.

You may be excused, Officer.

Mr. Wuliger, by your last question directed

to Officer Keith Reider, you again suggested that a witness in this case was guilty of a violent crime in direct violation of repeated instructions of this Court, and I find you in contempt.

Sentence will be at the conclusion of this case.

(Whereupon, an adjournment was had until Tuesday, October 15, 1974, at 9:00 o'clock a.m.)

A This is a close-up. It is not the entire porch at the back of the house if that's what you --

Q Right. Did you have a photo taken of the back of that house in September?

A I am almost sure this is the one I did because I was having the photographs taken.

Q State's Exhibit 37C is a photograph you had taken, am I correct?

A I directed the photographer to take it.

Q When?

A That night.

Q Okay. And did you tell the photographer where you wanted him?

A A rear view of the house.

Q You didn't specifically put -- get this picture, in other words, you just told him you wanted a rear view of the house, is that correct?

A Yes, sir.

Q Now, sir, State's Exhibit 42E and 42G and 42H, are these the only pictures you have with sticks in them in the car?

A Well, you will have to show me those other --

Q You don't know how many pictures there are of sticks?

A No.

Q. I think this one has one.

A. I will take your word for it.

Q. No. I don't know myself.

A. I think this has a stick in it, yes, it does.

Q. All right.

A. It is the 42 ones, A through D or E or something.

Q. I take it the pictures with the sticks in them were all taken in September.

A. September 4.

Q. There were no sticks in those cars when you saw them on May 30th, is that correct?

A. No, sir.

Q. You indicated this is the Shaw car, the Chevrolet belonging to people called Shaw?

A. Yes.

Q. And it was that car and that car alone that you put sticks in, am I correct?

A. Yes.

Q. Were you aware, Officer, that police officers were inside that car on May 29th and May 30th?

A. No, I was not. Inside?

Q. Yes, sir.

A. No.

Q. Sir, you were with the Homicide Unit, am I correct?

A. Yes, sir.

Q. And that unit is involved with the investigation and prosecution of homicides in the City of Cleveland?

A. Yes, sir.

Q. Now, in conjunction with your work in the Homicide Unit, had you ever heard the name Schoolboy before, Schoolboy Jackson?

A. Yes, sir.

Q. And were you aware on May 30th, 1974, that Lieutenant Joyce knew Schoolboy?

MR. MARINO: Objection.

THE COURT: Sustained.

MR. MARINO: To the line of this questioning also.

THE COURT: Sustained.

Q. All right, sir. In the last two years have there been a number of detectives associated with drugs in the City of Cleveland?

MR. MARINO: Objection.

THE COURT: Sustained.

Q. Now, I believe you have testified that you furnished Mr. Tolliver with a record of Schoolboy.

MR. MARINO: Objection.

THE COURT: Sustained.

Q. Did you furnish the prosecutor records, criminal records of any other witnesses that have testified?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Sir, when you interviewed Craig Fowler in the East Cleveland police station and when you conducted confrontations in the Cleveland police station in which asked questions of various people, I take it that on neither occasion was there anyone, any attorney present that was representing the interests of the people that were suspects, am I correct?

A You are correct.

Q And I take it that -- who was present when the confrontations were conducted, sir?

MR. MARINO: Objection only because it is repetitious.

THE COURT: I am sorry. What confrontations are you referring to?

MR. WULIGER: The confrontations in the Cleveland police station.

THE COURT: Confrontations between Schoolboy Jackson and these Defendants?

MR. WULIGER: Yes. Detective Farmer was present and I wanted to find out from Detective Farmer who else was present.

THE COURT: You may answer.

A My partner and Detective Turpay.

Q And I would be correct, sir, there was no stenographer present that was taking down a verbatim account of what was happening either in your interviews with Fowler or your interviews with these men at the confrontation stage?

A That is correct, sir.

Q And there was no tape recording made of your conversations with Craig Fowler at 3:30 in the morning, that interrogation, nor were there tape recordings made of the confrontation, am I correct, sir?

A None that I made. I don't know.

Q None that you made?

A I have no idea. I didn't do it and I have seen none.

Q Does that answer imply, sir, that there may possibly be a tape recorder?

A Mr. Wuliger, I don't have no idea. I don't have any idea.

Q Well, would it be a fair statement, sir, to say that to the best of your knowledge you and Detective Turpay did not record any of the conversations that occurred in that police station?

A We did not.

Q On May 30th, Cleveland police station?

A We did not.

Q And would it be a fair statement to say, sir, that to

best of your knowledge there is no tape recorder concealed in that interrogation room, confrontation room?

A To the best of my knowledge.

Q And would it be a fair statement, sir, to say that to the best of your knowledge you have seen no tape nor heard any tape of the conversations you had with these men on May 30th?

A I have not.

Q And the confrontation.

Now, sir, at the time you conducted these confrontations, you had placed these three men, Craig Fowler, Larry Johnson and Charles Jordon under arrest, am I correct?

A Yes.

Q And you arrested them in the Cleveland police station?

A Yes.

Q After East Cleveland brought them in.

A Yes.

Q And you were aware, sir, that they were going to go back to East Cleveland before Judge DeVinne that day?

A I was aware they were going back to East Cleveland.

Q All right.

A I didn't know the procedure.

Q And you aware that there were going to be some formal charges in connection with this case. You knew it at that time, am I correct?

A I didn't know.

Q Detective, would it be a fair statement to say that the reason that you had no lawyer present, no stenographer present and made no tape recording of these conversations was so that a subsequent jury would have to take your word for what was said in that room?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Now Detective, Mr. Tolliver questioned you about -- strike that.

You recall going to the home of Schoolboy Jackson in August of 1974?

A Yes, sir.

Q And I believe you indicated that the reason you went to Schoolboy's home was because Mr. Marino wanted to know what Schoolboy and other witnesses were going to testify about when they came into court?

A He wanted to know what happened.

Q Sir, were you aware that at the time you went to Schoolboy's home in August of 1974, that he had not honored the subpoena issued to him by Mr. Marino?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Sir, you have said that the reason you went to the

home was to find out what he was going to testify to in court. I believe you said that was your reason, am I correct?

A Mr. Marino wanted to interview him.

Q Did you ever hear Mr. Marino give a different reason for your going to that home, to the other lawyers in this case?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Now sir, I believe you have indicated to -- strike that. I believe you have indicated to Mr. Tolliver that in August and September of 1974 you saw no police reports which reflected that Asa Harris made any kind of statement, written or otherwise, am I correct?

A I have seen no records regarding Asa Harris.

Q You have seen no records concerning Asa Harris?

A No, sir.

Q So, are you saying that there may be a police report which reflects that Asa Harris made a statement?

A I have no idea, Mr. Wuliger.

Q Let me ask you this, Detective. Were you requested by the prosecutor's office to turn over your files so that they could proceed with the prosecution in this case?

A I was not.

Q Was the City of Cleveland, to your knowledge, requested

to turn over their police reports and their information to the County Coroner's office.

MR. MARINO: Objection.

THE COURT: Sustained.

Q Now, I believe you said that you first became aware sometime in September that some police officers were going to testify that Asa Harris made a statement, am I correct?

A I was called by Detective Stoiker.

Q Please, Detective, am I correct that you were made aware of this information sometime in September?

A Not if you say testify. I wasn't.

Q All right. Sir, you weren't aware that anyone was going to testify but you were aware sometime in September that some police officers were claiming that Asa Harris made an oral statement, am I correct?

A Yes.

Q Now, are you aware of when this information was first related to the defense lawyers in this case?

A I immediately told Mr. Marino about it and I am sure -- well, I think it was the first day of this trial he asked Mr. Tolliver or he asked me to see Mr. Tolliver.

Q Sir?

A That's the 23rd.

Q Sir, are you saying that you talked to Mr. Tolliver on

the 23rd of September and told him that police officers had taken a statement from Asa Harris? Is that your testimony?

A I believe it was the beginning of the trial or the selection of the jury.

Q Sir, if I were to tell you that that information became known to Mr. Tolliver while we were in this courtroom approximately two weeks ago, would you say I was mistaken?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Sir, isn't it a fact that you didn't mention a statement to Mr. Tolliver in the building at Lakeside and Ontario, isn't that a fact?

MR. MARINO: Objection.

THE COURT: He may answer.

A I don't recall.

Q All right.

A Well, it had to be at Lakeside.

Q It would have had to be in Lakeside if it was --

A We were finished with the form from Mr. Tolliver and Mr. Marino told me I should talk to him.

Q And you are saying that you told Mr. Tolliver on the 23rd of September that you had information that his client had made a statement to police officers and you gave that to Mr. Tolliver in unequivocal terms, am I correct?

A The date that Mr. Tolliver submitted the alibi to Mr. Marino is the date, whatever date that is on that form, and I don't have it, is the date he told me I should talk to Mr. Tolliver.

MR. WULIGER: I have no further questions, sir.

THE COURT: Anything further, Mr. Marino?

MR. MARINO: Nothing further at this time, your Honor.

THE COURT: Thank you, Officer. You may be excused.

We will take a short recess at this time, ladies and gentlemen. Please don't discuss the case among yourselves or with anyone else. Please don't permit anyone to discuss the case with you. We will be in recess for fifteen minutes.

(Thereupon a short recess was taken.)

(Thereupon the following proceedings were had in the absence of the jury:)

THE COURT: Mr. Wuliger --

MR. WULIGER: Yes, sir.

THE COURT: You again engaged in a line of questioning with reference to homicides, Mr. Jackson and the drug traffic. Will you explain

to the Court the purpose of that line of questioning?

MR. WULIGER: Will I explain to the Court the purpose of that line of questioning?

THE COURT: Yes.

MR. WULIGER: The line of questioning bears upon several things, if it please the Court. It bears upon the presence of Cleveland police officers at the scene of the crime. It bears upon the -- it is the contention of the defense that Jackson did not participate in this setup procedure until he had solidified his position in the Cleveland community. He was engaged in a drug war at that time, a drug war which was resulting in the deaths of numerous people. That it was not until he had solidified his position that he engaged in the activities as described in this lawsuit, i.e. brought these men into his home and set them up to make it appear as if they had robbed him. I was attempting to get to the information with reference to the elimination of Jackson's competition so that we could place it in point of time with reference to this case.

THE COURT: You were again attempting to show that the witness in this case has committed crimes; murder, which he has not been charged with or convicted of.

MR. WULIGER: No. Not necessarily that he has committed. Well -- I guess you would have to say he was involved in them. I am attempting to show the context.

THE COURT: Mr. Wuliger, you will recall the Court's previous admonitions and the previous two citations for contempt when you engaged in that line of questioning.

MR. WULIGER: I am aware that I have been cited for contempt, yes, sir.

THE COURT: And you are aware of the Court's admonition. You haven't forgotten those, have you?

MR. WULIGER: I am aware of the admonitions the Court gave me.

THE COURT: You are again cited for contempt, Mr. Wuliger. Sentencing will be at the end of the trial.

Let the record show Mr. Wuliger is found in contempt.

MR. WULIGER: I beg your pardon?

THE COURT: You were found in contempt, not cited for contempt.

(Thereupon the following proceedings were had in the presence of the jury:)

THE COURT: Call your next witness.

THEREUPON, the State of Ohio, to further maintain the issues on its part to be maintained, called as a witness BETHMARIE RISPOLI, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF BETHMARIE RISPOLI

BY MR. BARKAN:

Q Ma'am, would you state your name, please, and spell your last name for the record?

A Bethmarie Rispoli, R-i-s-p-o-l-i.

Q Mrs. Rispoli, is that correct?

A Yes.

Q Mrs. Rispoli, are you employed?

A No, I am not.

Q Now, directing your attention to May 29th, 1974, were you employed on that particular day?

A Yes, I was.

Q And where were you employed?

A Cunningham drug store at 260 and Euclid Avenue in Euclid.

Q Did you work that day?

A Yes, I did.

MONDAY MORNING SESSION, NOVEMBER 4, 1974

(Thereupon, the following proceedings were had in the absence of the jury:)

MR. MARINO: Your Honor, this is our next witness. Should she remain here during these proceedings? I thought the jury was coming down here.

THE COURT: Why don't you just step outside.

All right. Mr. Wuliger?

MR. WULIGER: Yes. If it please the Court, Your Honor, at this time I would like to proffer into the record the evidence or the testimony I expected from the witnesses that I indicated I wanted to subpoena and have here. On Friday, I indicated that I wanted them here today. CEI records custodian, Cleveland Electric Illuminating Company, to testify --

THE COURT: Do you have some authority for proffering --

MR. WULIGER: Proffering evidence?

THE COURT: Evidence of witnesses that didn't show up.

MR. WULIGER: Do I have authority for proffering?

THE COURT: Yes.

MR. WULIGER: No.

THE COURT: I understood you at the side bar on Friday that no subpoenas had been issued for any of these witnessed that you wanted to call?

MR. WULIGER: That is correct. I thought that Mr. Tolliver was going to take up the rest of Friday and I was prepared to have those subpoenas issued on Friday for Monday and these people were all on my witness list that I am indicating with the exception of Bayerl who is on the prosecution's witness list.

CEI records to testify with reference to the fact that their records reflect that the address on 4th Avenue, that the bills were billed to Andrew Jackson at that address. That he was the person paying those utility bills and that the average monthly bill was in excess of $100.

Patrolman Bayerl. I expect he would have testified substantially the same way he did at the motion phase of the trial. Detective

Datson, Cleveland Police detective on the Narcotics Squad. I expect he would have testified that Schoolboy Jackson has a first cousin who is a Cleveland Police detective.

Jerry Safincic is a narcotics officer with the Cleveland Police Department. I expect he would have testified that they were unable to arrest Schoolboy and build a case on Schoolboy because Schoolboy always knew when they were coming out.

Roger Carrier. I expect Mr. Carrier would testify that he was employed by the Federal Task Force Enforcement Administration against drugs, that he had formerly been employed by the Bureau of Narcotics and Dangerous Drugs. He is a Federal narcotics officer. He would have testified that Federal officers raided Schoolboy's place approximately a year ago at which time they confiscated all kinds of weapons. Furthermore, he would have testified that they are presently involved in an investigation with reference to Schoolboy's narcotic activities in the City of Cleveland and possible police involvement.

THE COURT: Is that it,

Mr. Wuliger?

MR. WULIGER: Yes, sir. Oh. Wait a minute. I had two witnesses that would have testified that they had purchased narcotics from Schoolboy; Sherry Williams and Denise Peoples.

THE COURT: Mr. Kelley?

MR. KELLEY: May it please the Court, counsel had approached the Court last week about proffering the testimony that was expected to come forth from a County Welfare employee who did appear and who was not permitted to testify. At this time I would want the record to indicate that contrary to what Schoolboy Jackson had stated here in the court, along the lines that he takes care of all of his children, that the County Welfare records would disclose that the child or children that he has by Judy Winegarner and Elvie Drake are indeed on the rolls of the County Welfare and are being supported by the County at large. Thank you.

THE COURT: All right. The Court heard nothing in any of these proffers that would be admissible evidence and in any

event, with respect to Mr. Wuliger's proffers, no subpoenas were issued for these witnesses and they were not available here to testify and the testimony was excluded originally because of that.

MR. WULIGER: Your Honor, didn't the Court indicate that the Court felt these matters were collateral?

THE COURT: Mr. Wuliger, these matters are not before the Court, the witnesses never having appeared here.

MR. WULIGER: Will the Court give me permission to reopen my case and subpoena these witnesses?

THE COURT: No. I don't give you permission to reopen your case to bring in witnesses to testify to the matters you have indicated.

MR. KELLEY: Your Honor, could the record show that there was time at the time of the defendants' resting their case for the prosecution to proceed with rebuttal but for some reason the Court decided, since the prosecution was not ready to proceed, to wait until Monday, today, for the prosecution to go ahead?

THE COURT: Mr. Kelley, you attempted on several occasion to testify in this case and I think it is about time you learned that lawyers do not testify and you shouldn't be offering things as testimony which aren't so. Mr. Tolliver had witnesses subpoenaed from out of town that were not here and he has requested further time to see if he could get those witnesses here, the witnesses from Cincinnati. So Mr. Tolliver's case and rebuttal evidence was continued until Monday. Mr. Wuliger did not have anybody under subpoena although his case had started to go in previous to the time that he offered -- that he requested --

MR. WULIGER: May I put something in the record?

MR. KELLEY: I would stand corrected then, Your Honor.

MR. WULIGER: May I put something in the record with reference to that, Your Honor, because as I recall it, I indicated to the Court that I had expected Mr. Tolliver to have witnesses and the Court told me that if I didn't have witnesses here, that I had to rest. You then asked Mr. Marino at the side

bar if he was prepared to go forward. He said that he was not, that he wouldn't have any witnesses here until Monday. It was at that point that there was a conversation with Mr. Tolliver with reference to going forward on Monday and I forgot to put into the record, if the Court please, the fact that what I expected to -- I do believe I indicated to the Court at the side bar, but I don't believe it indicates on the record, that when I objected to not being allowed to cross-examine Asa Harris, that the Court asked me at that time did I expect to impeach him and I indicated it was not my desire to impeach him but to go into some other areas and the Court asked what areas and I said one area which I thought was important to discuss was him observing a conversation between Schoolboy Jackson and Detective Copeland on the 4th Street porch in which Copeland was handed an envelope by Schoolboy and that he, Harris, had had a conversation with Jackson with reference to that and actually accused Jackson of paying off the police. I wanted to bring that out and I believe that I indicated it to the Court at the side bar but I don't believe that the record

reflected it.

THE COURT: Mr. Wuliger, nothing prevented you from calling Mr. Harris as a witness, did it?

MR. WULIGER: Your Honor, it is my understanding that I have a right to cross-examine witnesses who take the stand in a joint trial even if they are co-defendants. Any witness that I don't call, I have a right to cross-examine. There is something that prevented me from calling Mr. Harris and because Mr. Harris has no obligation to honor my calling him as a witness, he has a right not to take that stand and I had been given an indication from his counsel that Mr. Harris would not take the stand. So there was something --

THE COURT: Mr. Harris did take the stand.

MR. WULIGER: That's right, but I can't call him as a witness just as the prosecutor can't call him as a witness because he has a Fifth Amendment right not to take the stand.

THE COURT: Even after he has testified?

MR. WULIGER: Even after he has testified. Mr. Marino can't call him to the stand and neither can I.

THE COURT: Mr. Wuliger, are you telling me that Mr. Tolliver told you Mr. Harris wouldn't take the stand if you called him after he testified for further direct examination?

MR. WULIGER: Yes, sir. I am telling you that.

MR. TOLLIVER: Judge, may I clear up this matter?

MR. MARINO: Your Honor, we are belaboring this witness. I have a number of witnesses that have to leave this afternoon and that's why I think they are prolonging this.

MR. TOLLIVER: May I clarify the matter, Judge? When Mr. Wuliger asked me to have Mr. Harris testify to certain things as his witness, I, as his attorney, didn't feel that it would be to the best interest of the defendant to testify to those things and therefore I told him professionally that I did not want him to testify along the lines that he has just admitted to the Court and because

out of respect to me, then Mr. Wuliger didn't call him.

THE COURT: You didn't say he wouldn't take the stand?

MR. TOLLIVER: No. I just said that I wouldn't permit him to testify to those things.

THE COURT: It is always nice to get the truth after Mr. Wuliger has spoken.

(Thereupon, the following proceedings were had in the presence of the jury:)

THEREUPON, the State of Ohio, to rebut the evidence put forth by the Defendants, called as a witness MARY JANE HESCHE, who, being first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION OF MARY JANE HESCHE

BY MR. BARKAN:

Q Ma'am, would you state your name, please, and spell your last name for the record?

A Mary Jane Hesche, H-E-S-C-H-E.

Q How are you employed, Mrs. Hesche?

A Personnel secretary at Adelet Manufacturing.

THE STATE OF OHIO,)
) SS: 34240
COUNTY OF CUYAHOGA.) NAHRA, J.

IN THE COURT OF COMMON PLEAS

THE STATE OF OHIO,)
Plaintiff,)
vs.) No. 14174
CHARLES JORDAN,) C/A 34240
Defendant,) 14174
IN RE: WILLIAM T. WULIGER,)
(Contempt of Court))

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

John P. Butler, Esq., and
Roger Hurley, Esq., and
Dennis Butler, Esq.,

on behalf of William T. Wuliger.

Charles T. Birmelin
Daniel J. Thomas
Official Court Reporters
Cuyahoga County, Ohio

THE STATE OF OHIO,)
) SS:
COUNTY OF CUYAHOGA.)

NAHRA, J.

IN THE COURT OF COMMON PLEAS

THE STATE OF OHIO, Plaintiff,	
vs.	No. 14174
CHARLES JORDAN, Defendant,	C/A 34240
IN RE: WILLIAM T. WULIGER, (Contempt of Court)	

- - - -

TRANSCRIPT OF PROCEEDINGS

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Whereupon the following proceedings were had on Wednesday, November 20th, 1974, and Monday, December 2, 1974, in Court Room No. 17, before the Honorable Joseph J. Nahra.

- - - -

P R O C E E D I N G S

THE COURT: Please be seated.

This is the matter of contempt of Mr. William T. Wuliger.

Motion nas been filed on behalf of Mr. William T. Wuliger by Mr. Butler, and Mr. Hurley, seeking to have a jury trial, and have this matter heard by a disinterested Judge other than the Court that found him in contempt, and having written specification of charges against him, and for personal bond.

This matter was scheduled for hearing on November 18th, at 1:30. A continuance was granted to this afternoon at the request of Mr. Hurley.

Mr. Hurley, I would like to have you explain to the Court the circumstances that brought about your request for a continuance.

MR. HURLEY: Yes, your Honor.

May it please the Court, the matter was set for, as the Court has indicated, Monday at 1:30.

The information was given to me --

THE COURT: I might indicate, Mr. Hurley --

MR. HURLEY: Yes, your Honor.

THE COURT: So there is no confusion about this, this matter was set for hearing immediately after the verdict.

MR. HURLEY: Yes, your Honor.

THE COURT: And in the main case, which was returned at about 11:00 o'clock on Friday night, and Mr. Wuliger informed me at that time, which I already knew, that he had counsel, and so I set the matter for Monday at 1:30 after determining that Mr. Wuliger was not engaged in any litigation at that time.

MR. HURLEY: Yes, your Honor.

THE COURT: You may proceed.

MR. HURLEY: Thank you, your Honor.

Mr. Wuliger and I had contact on Saturday. Mr. Wuliger indicated to me, and I can't speak for Mr. Wuliger -- I believe he related the information to Mr. Butler subsequent to the Friday night verdict, that the

matter was set for 1:30 on Monday morning.

At 8:15 on Monday morning Mr. Wuliger called me at home, and indicated that he was ill, and requested that, and of course the Court well knows since Mr. Wuliger was engaged in trial for seven weeks there are a lot of matters that we have continued in his absence.

He asked me to cover all of the matters, and to continue the hearing before your Honor with reference to the contempt.

I indicated I would do that. I did that. I appeared here on Monday morning, and I requested that this matter be set for this time. I arbitrarily selected today, because I felt, first of all, that I had no idea whether Mr. Wuliger was going to be recovered earlier or out of his problem earlier. And two, because I felt that we needed time to regroup in terms of Mr. Butler's availability, my availability, et cetera, to be present here, and therefore I requested a continuance for two days.

THE COURT: You are not suggesting to me at this time that this matter

was continued for convenience of you, and Mr. Butler, are you?

MR. HURLEY: No, I am indicating to the Court that the reason I asked for a specific time to be set was so that I could then touch down with Mr. Butler, and make certain that he was available, and I am available for the purpose of the merits of this motion, and this hearing.

Subsequently Mr. Wuliger resumed his assignments, which had been previously set yesterday. That is, he commenced two cases that were set for Judge Jackson's room, which had been set in a number of rooms on a number of times when he was engaged in the trial that gave rise to this particular problem.

I want the Court to clearly understand that I did not continue this matter for the purpose of having Mr. Wuliger to have been engaged in a trial. Mr. Wuliger didn't even tell me when he wanted the case continued to. When he called me he told me he was ill.

I then came to this Court and requested this matter be rescheduled, and I think I

suggested the day, and that would be today at this time. But the reason I suggested the day had nothing to do with the fact that Mr. Wuliger resumed his commitments yesterday.

THE COURT: You were aware when you asked for the continuance that he was not very ill, because you asked for a continuance only for today, that is correct?

MR. HURLEY: That is correct. He indicated to me that he was sick, but not of such, obviously, neither one of us could diagnose it, but he was just ill to the stomach, and was unable to be present for his normal assignments, irrespective of the hearing at 1:30 Monday. He was not able to cover his normal assignments on Monday morning.

I therefore rescheduled it, after I talked to the Court, and left a note for Mr. Perk to schedule it today at this time.

THE COURT: The Court rescheduled it. It was not because you left a note.

MR. HURLEY: No, sir. I understand. I merely did that after the Court gave

me permission to reschedule it for now.

We then notified Mr. Butler to insure that Mr. Butler would be available for the hearing.

Subsequent to that time Mr. Wuliger resumed the commitments that had been previously scheduled for Tuesday. It is not a matter of my scheduling ti for Wednesday because he had a commitment on Tuesday. It was my scheduling Wednesday because I felt I had several people, one I didn't know his health situation, and I felt that two days was reasonable and too, I had Mr. Butler and myself to concern with in terms of rescheduling.

So I know that the Court called me yesterday, and the Court was somewhat concerned because the Court had been aware that Mr. Wuliger had commenced a commitment in Judge Jackson's room. I want to assure the Court that the two events had nothing to do with one another. That is my selection of Wednesday afternoon at 1:30, bore no relation to Mr. Wuliger's assumption of his commitment on Tuesday morning.

Have I answered the Court's question?

THE COURT: You have answered it as far as you are concerned. You are representing to me that that is the case as far as Mr. Wuliger is concerned?

MR. HURLEY: I am representing to you what Mr. Wuliger's communication to me was that he was ill at 8:15 on Monday morning. I had no communication with Mr. Wuliger until after your phone call last night.

THE COURT: Weren't you aware that he was at work yesterday?

MR. HURLEY: When you called I was.

THE COURT: That was in the afternoon. You didn't talk to me until very later afternoon.

MR. HURLEY: That is right. I did not see Mr. Wuliger from Saturday until after your phone call.

THE COURT: I didn't ask whether you saw him. I hope you are not evading the answer to the question.

MR. HURLEY: No, I am not.

THE COURT: You were aware that

he was at work yesterday?

MR. HURLEY: I was aware prior to your phone call that he was at work, yes, sir.

Mr. Wuliger's commitment was scheduled prior to my having requested a continuance. However, when I requested a continuance until Wednesday, I had no personal knowledge at that time that Mr. Wuliger had a commitment on Tuesday.

Okay.

THE COURT: When was Mr. Wuliger assigned to the case that he is now engaged in?

MR. HURLEY: I cannot answer that, but Mr. Wuliger can, it would be some two months ago, I would assume.

THE COURT: Is that right, Mr. Wuliger?

MR. WULIGER: When was I assigned to the case I am presently assigned to?

THE COURT: Yes.

MR. WULIGER: If it please the Court, I believe it was August of 1974 that the -- are you asking when it was assigned for

that trial date?

THE COURT: When was it assigned to you? You personally, as opposed to any other member of your office.

MR. WULIGER: I believe, sir, the 16th of August, 1974.

THE COURT: When was it set for trial?

MR. WULIGER: It was scheduled for trial on the 11th of November, 1974. That turned out to be, I believe, a holiday, and it was again scheduled for trial on the 12th, and then it was continued until the 19th, and perhaps the Court will recall that on Friday evening, when we took the verdict, the Court specifically asked me if I had any trial commitments for Monday. At that time I indicated that I did not, but I did have a trial commitment for Tuesday. And this was the case that I am now in trial on, that I made reference to.

I knew that was scheduled for trial on Tuesday, but those are the dates as best I can give them to the Court.

THE COURT: When you asked Mr. Hurley to get a continuance, you were aware that you were engaged in trial on Tuesday?

MR. WULIGER: Yes, sir.

THE COURT: How long did you ask him to continue the case?

MR. WULIGER: I didn't. I didn't give him any time.

THE COURT: Did you tell him how sick you were?

MR. WULIGER: I told him I had the flu. In fact, I talked to Mr. Hurley on Sunday, and told him I wasn't feeling well, but if I felt better, if I didn't feel better on Monday, I would call him Monday morning, which I didn, because I didn't feel sufficiently better.

THE COURT: What did you tell Mr. Hurley that led him to believe that you would be available for hearing on Wednesday, but not on Monday?

MR. WULIGER: All I told Mr. Hurley was that I didn't feel well enough to go in to work. That is all I told him.

THE COURT: You left it up in

the air, and just told him to get a continuance, and he went ahead and got a continuance for only two days without any further comment by you?

MR. WULIGER: Yes, sir.

MR. HURLEY: That is correct, your Honor.

Your Honor, he indicated to me that he was ill to his stomach. He was throwing up. I therefore thought that it was something that I just gone through a couple weeks before, some kind of a flu or 24-hour type flu. But I certainly recognized that what was about to occur with reference to his Contempt was an extremely upsetting and serious matter, so I thought I would continue it for two days for the reasons I have heretofore stated.

I just want to emphasize, the Court does not know how I run the office -- sometimes I don't, but what I do every night is look to the commitment of the following day, and I was in this courtroom on Monday, before having looked at the commitments for Tuesday. It so happens that the commitments for Tuesday were fulfilled on the premise that if Mr. Wuliger

was not available, that I would have another lawyer moved in Judge Jackson's room, and requested further continuance, because Mr. Wuliger was not available.

But at the time I came to this Court I was not cognizant, even though it was already in my books, that Mr. Wuliger had the trial commencing on Tuesday.

THE COURT: You may proceed to argue the motion you filed.

MR. JOHN BUTLER: If it please the Court, Counsel, we have filed a few days ago following the Court's citation for Contempt, a motion asking the Court in handling the pending Contempt citation, to accord Mr. Wuliger a jury trial, to reassign the case to some Judge who has had no previous contact with the experiences that brought the situation in Contempt, and also to furnish Mr. Wuliger or his counsel with a specification of charges, detailing those facts of his conduct in the present of your Honor that have been concluded to be the basis for Contempt.

Now, on the request for a jury, we have

cited some reasons in our brief which to me are respectable ones, and I will be content to rely on the authority cited in support of a request for a jury trial.

I must say that in my experience I have not recalled any jury trials under a Contempt charge, because the nature of the charges seem to me so distinctly a question of law, but on the others I am anxious to pursue them with ardor, your Honor, because in this kind of a matter I think it is in the interest of justice that the guarantees of due process be protected. And while volumes have been written on due process, a quick and easily recalled definition of due process amounts to the fact that it requires that a person get proper notice in sufficient detail to be able to meet it, which is what we are asking, and the right to be heard before a competent tribunal.

Now, this is stated at random from memory, and yet the authorities in our small brief seem to support this.

I don't expect at this time to get into the merit of the citation in Contempt, but

from what I have been able to read, I could not properly conclude about the citation. I need much more information, and I think we would be entitled to it under the doctrine of due process, to note exactly what particular action, statement or demeanor on the part of this defendant cause the conclusion which may be correct, that he was guilty of Contempt.

From the things I have been able to read, which do not contain the printed record of the trial itself, but are limited to conferences in the Court's chamber, and to one proceeding outside the presence of the jury, I would be inclined to think that Contempt does not appear possibly from the language used, and if contempt was to be predicated, it would have to arise from provocative demeanor, tone of voice or something which thus far has not become apparent to me. And so when I say what I say that I would like specification of charges, I am not trying to encumber the Court unnecessarily. I am trying to resort to some dilatory proceeding, which it is perfectly

apparent that the Court frowns on such things -- from your comments about the continuance already available to the defendant in this case -- so I of all th ings am not anxious to delay, neither am I anxious to proceed carelessly when the interest of another lawyer, with whom I hold in such regard as I hold that lawyer, when his welfare is at stake, it well moves me to proceed with every care of which I am capable.

THE COURT: Aren't we past the question of specification of charges since this man has already been found in Contempt?

MR. BUTLER: Well, I don't believe that that is true for this reason: If the Court, in the summarily Contempt action, and I must agree that a Court has of necessity summarily powers of Contempt to protect the dispatch of justice, and the majesty of the law, but if that was the case, I think the Court would say I find you guilty of Contempt, and I sentence you forthwith, which seems to be a necessary element of summarily Contempt. And then to accommodate the conduct of the trial, in which he is engaged, the Court

might say, and I suspend the execution of sentence until the conclusion of the proceeding in which you are engaged. And this I do in the interest of justice.

But there is nothing in any record that I have that indicates that to be the case.

I do find, and have cited in the brief, many reasons why specifications are necessary under the due process clause of the Constitution.

The Supreme Court, in Cook vs. United States, 267 U.S. on page 3 of our brief states, punishment without issue or trial is so contrary to the usual and ordinary indispensable hearing of judgment constituting due process that the assumption that the Court saw everything that went on in open Court is required to satisfy the exception, but the need for immediate penal vindication of the dignity that the Court created.

Summary judgment has always been regarded as in this favor.

Groppi vs. Leslie, 404 United States, and there are several respectable decisions,

United States Supreme Court, supporting these requests that we make, in Condistoti vs. Pennsylvania, 94 Supreme Court, when the Trial Judge postpones until after the trial the final conviction and punishment of the accused or his lawyer for several or many actions of contempt committed during the trial, there is no overriding necessity, for instance, action to preserve order, and no justification for dispensing of an order rudiment of due process. And, your Honor, I would, with the highest respect, urgently suggest that there would probably be no miscarriage of justice, there would be no detraction from the dignity of the Court, there would be no diminution of your inherent powers to punish for contempt if you were to accede to the request for specifications, and the adjudication of this matter before another court.

THE COURT: You care to be heard, Mr. Hurley?

MR. HURLEY: Your Honor, I would only state that I think the questions here that the Court must determine is the question of whether or not this Court within a week of a

seven-week arduous trial, which was a stress upon not only counsel, but certainly the Court feels that this Court can put aside all the highly volatile history of that trial, and act as accuser, finder of the facts, and executioner of the sentence, I think that if this Court feels that in the interest of justice this Court should pass the questions, on the questions represented on motion, that is one way. If this Court feels otherwise, then I would ask the Court, no matter what its disposition, to permit us, in the interest of justice, to test these questions on appeal, and to permit Mr. Wuliger to be free of any incarceration or any fine, that is, whatever fine and incarceration the Court sees fit to impose during the course of appeal.

What I am really saying, either the Court feels that the Court could defer this to another Judge for disposition on all the motions, all the questions or whether the Court feels otherwise, if the Court feels otherwise, the Court feels that it has the right at this point to pass, that we would ask that the imposition

of that sentence be stayed, and that Mr. Wuliger be permitted to remain at liberty pending an appeal of the questions that we presented before this Court.

THE COURT: Aren't you complaining that I didn't sentence Mr. Wuliger during the course of the trial, and also that that would have been in the heat of the battle, and now you say you can't sentence him either because I should have sentenced him before?

MR. HURLEY: Your Honor, this Court did what this Court did. I am not going to second guess what your Honor did with reference to this particular matter. We are here in a situation where it may be argued that the summary powers of the Court may have been waived by virtue of the Court leaving open the question of sentence or disposition. I don't think that is the crux of the matter, as I have indicated, whether the Court feels that the Court should be placed in the position of finding and sentencing in connection with this case, because of the circumstances. But the most basic request I would have, if the Court

feels otherwise, that whatever sentence this Court impose, be stayed pending appeal.

THE COURT: Mr. Butler.

MR. JOHN BUTLER: If you please, your Honor, I don't think I want to say much more on the request in the motion, but I have been in this Court for several important trials. They were important to me, and I have an abundance of respect and regard, and admiration, in the manner in which the proceedings were conducted, and there has never been anything to diminish that regard.

Now, I should not perhaps talk about the merits of this case at this time, because it seems I myself have labeled such remarks as premature, but I have come across some statements in 11 Ohio Jurisprudence 2d, page 99, to the following effect: However, neither attorney nor his client are guilty of Contempt of Court when either believing in good faith that a rule of Court limits his just and legal rights, proceeds by lawful method, and in a respectful manner to test the validity of such rule. Manifestly, a litigant or his attorney is not

to be punished for Contempt for a mere mistake.

Now, I have never seen the record in this trial, but one time I was asked to visit the defendants, and I did in the jail, and I didn't succeed in being retained, for reasons that you won't be even midly interested in, but I learned enough about the thing in which they were involved to realize that this must have been a violent, and contentuous proceeding at this trial, and I know Mr. Wuliger is an ardent lawyer, and I know from an old adage, that sometimes ardor and zealous are more trouble than malice.

I have never read the record of the trial, and I think I should be permitted to do that if we have to go forward with it, but I think it was a contemptous proceeding. I think the human element became involved, and speaking for Mr. Wuliger, if the Court could find it possible without arousing the dignity of the Court, the respect in which we hold it, to just vacate these proceedings, I am sure Mr. Wuliger would be willing to tender an apology for whatever offenses he might have committed in the

heat of trial.

Now, I have been in trials of criminal cases for a long time, and I think, as I look back, that except for the magnanimous, and kindly attitude of some of the tribunal before I appeared, and might have been frequently cited for contempt, because it is impossible to contend with vigor, and not encounter some emotion. That is what we trial lawyers do. That is the merchandise, and if the Court could find it possible to dispose of this matter in that fashion, I think it would be in the interest of everybody concerned, your Honor.

THE COURT: Mr. Butler, I hope you are not suggesting that an ardent lawyer doesn't have to abide by the rules.

MR. BUTLER: No. I am not suggesting that he doesn't have to abide by the rules, but I think that a tribunal is frequently justified in regarding with tolerance those indignities that he might commit in the ardor of contention.

I think a Court could well forgive his inadvertance, and not intentionally disrespectful,

such transgressions.

THE COURT: Gentlemen, you have both -- I mean, you have cited in your brief the case of Taylor vs. Hayes where there is some language about the alleged contempt being personally directed at the Court.

Do you make any claim in this case that that is the situation?

MR. BUTLER: May I find that in just a minute?

THE COURT: It may not be in the portion cited in your brief, Mr. Butler, but it is in the case.

MR. JOHN BUTLER: I see, on page 3 of the brief a reference to Groppi vs. Taylor. In Groppi vs. Taylor --

MR. DENNIS BUTLER: You are referring to page 5?

THE COURT: I am not referring to any page. I am referring to the case itself.

MR. DENNIS BUTLER: It is quoted on page 5.

MR. JOHN BUTLER: There was never any intention to cast any criticism on the

conduct in any fashion whatsoever.

The research on this was done by Mr. Hurley's office.

THE COURT: All right. Gentlemen, this case will be continued to the conclusion of the matter Mr. Wuliger is presently involved in and I expect that upon the conclusion of that matter you will immediately notify the Court, and we will have an immediate hearing to conclude this matter.

(Whereupon an adjournment was had.)

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MONDAY MORNING SESSION, DECEMBER 2, 1974

THE COURT: This is the matter of the Contempt findings against Mr. Wuliger. On behalf of Mr. Wuliger, Mr. Butler and Mr. Hurley filed a motion for hearing before a disinterested Judge, personal bond, written specification of charges and a jury trial, and we heard arguments on that motion at a previous time. The Court has considered these matters and is denying the motion. We are here concerned with a direct Contempt action committed in the presence of the Court under Section 2705.01 and not with a Contempt proceeding under the section cited in the brief, 2705.02 B and 2705.04. These matters occurred in the presence of the Court and in full view of the Court and constitute a direct Contempt.

Mr. Wuliger, would you step forward, please.

MR. JOHN BUTLER: Your Honor, before proceeding I wonder if the Court would indulge me with one request that has to do with the motion that I would like to include in the

record?

THE COURT: You may proceed.

MR. JOHN BUTLER: I think in my remarks presented on the last opportunity for appearing here I stated that we would like a specification of charges. I would like to reiterate that request at this time for this reason, your Honor, I would like to contend, with the highest respect for the remarks that the Court has just given us, that I have never seen the printed record of what took place in the trial of this case, yet I am convinced that it was something that took place during the trial, something due to the conduct of the respondent here that the Court found it necessary to assign a finding of Contempt.

Now, it would seem that due process would require -- I am perfectly aware that due process can fill libraries, but for working purposes two things cannot be denied: Due process does involve proper notice and the right to be heard before a competent tribunal. Now, it may be very true that the printed record of this trial might very well reveal

assigned reasons for finding the defendant or the respondent guilty of Contempt, but if I have never had a chance to examine those incidents from the printed record then I have not been enabled to defend him in this hearing as well as I could have had I been able to read the printed record. Now --

THE COURT: You have seen the transcript of the instances where Mr. Wuliger was cited and where he was cautioned about his conduct before he was cited for Contempt, have you not, Mr. Butler?

MR. JOHN BUTLER: I have seen two excerptings from printed records, one was in chambers and the other was outside the presence of the jury and, therefore, could not have been part of the trial. I have seen discussions between Mr. Wuliger and the Court, but I have never seen the thing that was done by Mr. Wuliger and assigned by the Court as contemptuous conduct that was done during the trial.

Now, I have been confronted with the obligation of contending against only a conclusion, your Honor, and I feel I am in the

same position as a man who received an indictment that said the Grand Jury finds that you are guilty of burglary. Now, the man might be a burglar of long standing and of renown, but he would be entitled to know whose place he broke into, on what date it happened and in what county.

THE COURT: Mr. Wuliger has been unable to tell you that, I presume, from your remarks, Mr. Butler?

MR. JOHN BUTLER: Well, I don't think I would be required to accept his judgment from what the record showed. The printed record would be the best evidence of what he did in Court.

THE COURT: You have also been unable to get a copy of the printed record?

MR. JOHN BUTLER: I have been unable to get a copy of the printed record in the time that I have been identified with this defense.

THE COURT: Well, that has been quite some time, Mr. Butler.

MR. JOHN BUTLER: Well, it took us --

THE COURT: It has been at

least --

MR. JOHN BUTLER: . It took us two hours to get a stenographer here this morning.

THE COURT: Well, I understand that, but these transcripts of the proceedings were obtained some time ago. You have been in this case for just about a month now that I am aware of. Your original motion was filed on November 7th and I presume that you were retained prior to the motion being filed.

In any event, in any summary proceeding you would have the same situation. As you well know the transcript in this case will probably run 10,000 pages and the Court has no intention of delaying further. There has been some delay through what the Court considers devious means to this date. I do not intend to delay further while a 10,000-page transcript is prepared and we suffer undue process. Due process is one thing, undue process is another.

Is there anything you wish to say with respect to sentencing?

MR. JOHN BUTLER: No, your Honor, I do not. I am grateful for the opportunity to

make the request I made. I have no criticism of anything that the Court has done, but I wanted to make that request in the record.

THE COURT: Mr. Wuliger, do you wish to say anything?

MR. WULIGER: I do. May it please the Court, I would like to take this opportunity to thank Mr. Butler -- Mr. John Butler and Mr. Dennis Butler for their assistance in this matter. They are both gentlemen that I hold in deep respect. I would also like to thank Mr. Hurley who also has stood by me in this and my employer Mr. C. Lyonel Jones and the numerous other brothers that I have in the profession who have offered their services and their support in this matter.

I would like to indicate that I do not believe that any of my conduct, anything I said or did in that trial was or is in Contempt of this Court. I would be less than candid if I did not indicate to the Court at this time my chagrin and displeasure in being forced to answer and forced to be sentenced without being afforded a hearing before a disinterested body. I stand

before this Court and indicate to this Court that no devious means were used to delay these proceedings and that no Contempt has ever been my intention, my design or in my judgment my conduct.

THE COURT: Mr. Hurley, do you wish to be heard?

MR. HURLEY: Yes, your Honor, briefly on the question of sentencing. I would state to the Court that although I was not present during the course of these matters I am privy to some of the facts and circumstances and I think the Court during the course of the trial will recall that at times I was present in and out in the back of the courtroom, especially after the first Contempt, to try and get an idea of what was occurring and what kind of matters were involved in the specific situation. I would respectfully state to the Court that the Court is much better aware than am I of the totality of circumstances, but I would hope that the Court would pass its judgment compassionately, I would hope that the Court would consider that Mr. Wuliger's

conduct was not directed toward the Court. I think the Court made that distinction the last time we were here on the question of our citing a case where the Contempt was directed directly to the Court. What the Court has found to be contemptuous is what the Court considers to be Mr. Wuliger's over-zealous protection of what he considered to be his client's rights on all of the occasions. I would ask the Court to consider that sometimes, especially during the trial which was deeply emotional, one of the longest trials in the history of the county, a trial where there was much emotion on both sides of the case, a trial where this Court's patience was tried many times during the course of this lengthy trial, that the Court recognize that it is very difficult for advocates sometimes to draw the line between fully and firmly and totally protecting the rights of the client and going too far, and that I would underline the fact that I think on all three occasions what the Court considered to be contemptuous was that Mr. Wuliger went beyond the bounds of advocacy and that his fear for his client was disrespectful

for the Court.

The Court well knows that Mr. Wuliger does not enjoy the prospect of choosing between strict compliance wit the Court and total, full representation of the client, which may have occurred in this case. I do not know that because as I said I wasn't present, but I would underline to the Court that all three occasions involved over-advocacy, over-zealousness and were not directed at disrespect for this honorable Court or for the person of this honorable Court.

I would therefore ask the Court to consider that in its sentence. I would further ask the Court to consider staying the execution of whatever sentence this Court feels is appropriate in the premises until such time as we can ascertain whether or not the rights of an impartial arbiter and other related questions as contained in our motion are worthwhile and until such time as we can prosecute an appeal in this case.

I think that the Court recognizes that while the Court has its own notions and ideas

and beliefs as to what are the legal ramifications of this Contempt, that there may well be a bona fide or bona fide legal questions involved in this matter and I would certainly hope the Court would recognize that any fine or any jail time in connection with this should be withheld in abeyance until such time as we can ascertain the rectitude of the Court's rulings here this morning. Thank you, sir.

THE COURT: Anything further, gentlemen?

Mr. Wuliger, you exhibited complete Contempt for the fairness of the judicial process. After a long series of improper questions the Court called you in chambers on the record and discussed this fully with you so that you were aware of the Court's position, with respect to the improper questions that you had been placing, and despite this you continued to persist in this course of conduct and on three separate occasions you asked exactly the same type of improper question and you were cited each time on those three occasions. Your conduct is all the more contemptuous of the

Court and the fairness of the judicial process, and I don't mean that of the Court personally, because it was calculated and premeditated. The questions that you ask originated with you, they did not come about during the heat of cross-examination from something a witness said. Your conduct was a deliberate attempt to suggest to the jury that witnesses had committed crimes of murder for which they had not been charged or convicted. It was a deliberate attempt also to inject the elements of violence and reprisals into the case. This could not be erased from the minds of the jury by any instruction the Court could give and the effect of these improper suggestions to the jury can only be speculated upon. You cannot plead ignorance or inexperience because you have neither. You apparently feel that the rules do not apply to you and that you can use any means to win a case. However, unfortunately you were mistaken in that belief. Unfortunately for you because the Court finds no other way to insure the fairness of the judicial process in this type of situation than to impose a

sentence upon you on each of these findings for Contempt. You are sentenced to five days in the County Jail on the first Contempt, ten days on the second and fifteen days on the third. These are to be served consecutively and there will be no bond.

MR. JOHN BUTLER: I might call the Court's attention to Section 2953.051 of the Code which seems to make bond an order and I would like to have the Court look at it before continuing these proceedings. We have ready to file a notice of appeal and a motion for the Court to set bond and if I can get this statute, I will show it to you and I think it will be apparent that maybe I have an idea it could be well-founded. Section 2953.051 deals with the subject of bail on misdemeanors.

THE COURT: Contempt is a special type of proceeding, Mr. Butler, and I do not find that this section applies.

MR. BUTLER: Wouldn't you agree it is also a misdemeanor under that section?

THE COURT: Mr. Bailiff.

THE BAILIFF: Please rise.

MR. HURLEY: Your Honor, is the Court overruling my request to stay the execution of sentence?

THE COURT: Yes, the execution is not stayed.

MR. HURLEY: Thank you, your Honor.

- - - -

PROCEEDINGS CLOSED.

- - - -

CERTIFICATE

We, Charles T. Birmelin and Daniel J. Thomas, official court reporters for the Court of Common Pleas, Cuyahoga County, Ohio, do hereby certify that as such reporters we took down in stenotypy all of the proceedings had in said Court of Common Pleas in the above-entitled cause; that we have transcribed our said stenotype notes into typewritten form, as appears in the foregoing Transcript of Proceedings; that said transcript is a complete record of the proceedings had in the trial of said cause and constitutes a true and correct Transcript of Proceedings had therein.

Charles T. Birmelin

Daniel J. Thomas

Official Court Reporters
Cuyahoga County, Ohio

OFFICIAL COURT REPORTERS
Court of Common Pleas
Cuyahoga County, Ohio

34240

FILED
COURT OF APPEALS
DEC 2 1974
EMIL J. MASGAY
CLERK OF COURTS
CUYAHOGA COUNTY, OHIO

IN THE COURT OF COMMON PLEAS
CRIMINAL DIVISION
CUYAHOGA COUNTY, OHIO

NO.

HONORABLE: JOSEPH NAHRA

CR 14174 A

IN RE: WILLIAM T. WULIGER : NOTICE OF APPEAL

Notice is hereby given that William T. Wuliger defendant, hereby appeals to the Court of Appeals of Cuyahoga County, Ohio, Eighth Appellate District from the final judgment entered in this action on the 2nd day of DECEMBER, 1974.

John P. Butler
John P. Butler
Williamson Bldg.
Cleveland, Ohio 44113

NOTICE

A COPY OF THIS NOTICE OF APPEAL HAS BEEN DELIVERED TO THE OFFICE OF JOHN T. CORRIGAN, COUNTY PROSECUTOR, THIS 2 day of Dec, 1974.

John P. Butler

THE BAR ASSOCIATION OF GREATER CLEVELAND
MALL BUILDING · 118 ST. CLAIR · CLEVELAND, OHIO 44114 · 216/696-3525

December 26, 1974

William T. Wuliger, Esquire
2108 Payne Avenue
Cleveland, Ohio 44114

RE: Complaint of
Hon. Joseph J. Nahra;
Grievance File 74-204

Dear Mr. Wuliger:

The Grievance Committee of The Bar Association of Greater Cleveland has received a letter of complaint from Hon. Joseph J. Nahra, a copy of which is enclosed for your reference.

Upon receiving such a complaint, our initial effort is directed toward maintaining good relationships and assisting in clarifying what often might be a case of misunderstanding or a lack of communication.

Before proceeding further in regard to this particular complaint, your response is requested to the questions presented by Judge Nahra. By our procedure, such a response is to be made, in writing, and filed with this office within two (2) weeks.

Under The Supreme Court Rules for the Government of the Bar of Ohio, this inquiry of the Grievance Committee is private and confidential.

Very truly yours,

Thomas J. Brady
Counsel

TJB/cts

Enclosures

APPENDIX A1

COURT OF COMMON PLEAS
COUNTY OF CUYAHOGA
CLEVELAND, OHIO 44113

JOSEPH J. NAHRA
JUDGE

December 12, 1974

Grievance Committee
The Bar Association
of Greater Cleveland
118 St. Clair Avenue
Cleveland, Ohio 44114

Gentlemen:

I wish to file a complaint against Attorney William T. Wuliger because of his conduct in the trial of State v. Charles Jordan, et al., Case No. CR-14174.

This case involved multiple charges of aggravated robbery, aggravated burglary, kidnapping and attempted aggravated murder against each of four defendants.

The reasons for this complaint are as follows:

1) In cross-examining one of the alleged victims, Andrew Jackson, Mr. Wuliger asked him numerous questions suggesting that he had killed various people or had some connection with persons who had been killed, when no evidence of such matters was admissible in the case being tried.

2) Mr. Wuliger and an associate represented one defendant, and each of the other defendants had an individual lawyer. Mr. Wuliger asked the same witness, Andrew Jackson, if he had threatened defense counsel in the case. No such threats had been made. See Exhibit A.

3) Mr. Wuliger asked the same witness, Andrew Jackson, if he had called and threatened him (Wuliger) personally. When asked about this, Mr. Wuliger indicated that he had received a phone call from someone purporting to be his client's father, and he knew it was not his client's father as he knew his client's father was dead. He did not indicate that any threat was made during this phone call, and, in any event, had no evidence the witness had made the call. See Exhibit A.

APPENDIX A2

4) He asked the same witness, Andrew Jackson, if he had put a contract out for $5,000.00 on the head of each of the four defendants. He had no evidence to support such suggestion, but claimed he was not being irresponsible because he had witnesses who could say they had heard this on the street. See Exhibit A.

5) He asked another witness, one Judy Winegardner, questions about possible violence having been committed by Andrew Jackson, whether she had ever seen Jackson shoot anyone, and questions about whether she knew some of the people Mr. Wuliger had suggested had been killed by Andrew Jackson. His questioning of this witness suggested that one of the people he was asking her about was now deceased, the admitted (by Wuliger) inference being that Andrew Jackson had killed this person. See Exhibit B.

6) He asked a police officer whether he had participated in an arrest where the suspect had not reached the station alive. The matter asked about had nothing to do with the case on trial, and the policeman was never charged, let alone convicted, of any such offense. See Exhibit C.

7) On another occasion, he asked a witness questions which implied that Andrew Jackson had been responsible for homicides for which he had not been charged or convicted. See Exhibit D.

8) During a recess in the trial, one of the defendants destroyed some evidence which was about to be introduced. The Court was convened outside of the presence of the jury for the purpose of inquiring into what had happened and determining what to do about the evidence (some alleged marijuana) which had been destroyed. During the course of comments being made by the defendants, one or two of the defendants made some comments that everybody knew that the Court had been threatened by the Fraternal Order of Police, that they would have my job if the defendants were acquitted. When the Court inquired further into this matter, one of the defendants indicated that people had come to them and told them about the pressure on the Court. Mr. Wuliger volunteered that he had heard the same rumor. When the Court pressed Mr. Wuliger as to where he heard the rumor, he said: "I heard it from the defendants". Although this was done out of the presence of the jury, it was done in open court during the trial of a case that was being regularly covered by the newspapers. See Exhibit E.

9) The Court ruled there would be no cross-examination of co-defendants unless they gave testimony adverse to a particular defendant. Mr. Wuliger asked permission to cross-examine Asa Harris, one of the defendants. The Court stated to him that he could call Mr. Harris as part of his own case. Mr. Wuliger then stated that Harris' Attorney, Stanley Tolliver, had told Wuliger that Harris would assert his Fifth Amendment privilege against self-incrimination if called by Wuliger in Wuliger's case. When asked about this, Tolliver stated he had only indicated that he preferred his client not be subjected to any further interrogation.

10) He accused Detective James Copeland of taking bribes from Andrew Jackson, again with no evidence.

11) He asked Detective James Copeland, of the East Cleveland Police Department, if he knew of any Cleveland Police Officers taking money from Andrew Jackson.

12) In his closing argument, Mr. Wuliger:

a) asked if Andrew Jackson would back away from bribing police officials,

b) asked if he would back away from murder,

c) referred to a drug war,

d) expressed his opinion that Andrew Jackson probably would have killed one of the defendants,

e) stated that he personally knew the harmful potential of narcotics since his father had been a cripple and had become addicted to morphine.

On none of these items was there any evidence.

13) After being sentenced for contempt arising out of Items 5, 6 and 7 above, Mr. Wuliger appeared on television that night and stated he was just doing his job, and if he had it to do all over again, he would do it exactly the same way.

14) On the day after he was sentenced for contempt and after he had been released from custody, he returned from the Court House to pose for a picture with two Sheriff's Deputies and with himself in handcuffs. See Exhibit F.

15) He insisted on pretrial interrogation of several members of the O'Brien family to see if the identification procedures were improper when the defense of those identified was not mistaken identity, since they admitted being in the O'Brien home and were in fact apprehended coming out of it.

The above is by no means a complete recital of Mr. Wuliger's misconduct. He debased the judicial process in many other particulars which I cannot fully cite from my notes or memory. His entire approach was to delay, confuse, introduce irrelevancies, create error, cause a mistrial, ridicule and demean witnesses and otherwise obstruct the proceedings. He accused the Court of being responsible for news items concerning the change of location of the trial after a scuffle between the defendants and Sheriff's Deputies; he asked a police officer who had been wounded in the top of the shoulder whether he thought the defendants who were holding out in the O'Brien house had "air support"; when he ran out of witnesses he attempted to call the prosecutor to the stand, and when denied that, he attempted to call his co-counsel.

Your attention to these matters is, in my opinion, a matter of importance to the legal profession.

Very truly yours,

Joseph J. Nahra

JJN:cb

APPENDIX A5

(Excerpts of proceedings had in the Court's Chambers, on Tuesday, October 1, 1974:)

* * * *

THE COURT: The next item is the question of some threats having been made in this case.

Have you been threatened, Mr. Wuliger?

MR. WULIGER: I don't know if I could call it a threat. I received a phone call at my home Sunday from a man who related to me that he was Mr. Jordon's father -- my client -- and proceeded to question me, and I did not relate any information to him. However, it is the fact that my client's father is deceased, and I don't know whether this is a threat; whether I am being informed that people know my name, and my number. But I know that was not my client's father that called me. And I questioned this Mr. Jackson whether he knew anything about that phone call. He said he did not. I didn't go into it. But I have had witnesses' whose children have been threatened with reference to testifying against this man Jackson.

APPENDIX A6

I have had witnesses who have indicated they were in fear of him.

THE COURT: You indicated that the defendants, and other defense lawyers have. The other defense lawyers have any information about any threats --

MR. WULIGER: I don't know if anybody in the --

MR. ADRIAN: I haven't received any calls.

MR.TOBLIVER:: I haven't either, Judge.

THE COURT: Didn't you ask Mr. Jackson about that?

MR. WULIGER: I asked Mr. Jackson whether he knew anything about whether he was responsible for a call I received at my home on Sunday. He did say he didn't --

THE COURT: I thought you referred to other defense lawyers.

MR. WULIGER: I may have. Off the top of my head I don't recall what my question was.

THE COURT: How about the question that you asked with respect to contracts

being out on the lives of the defendants?

MR. WULIGER: I have information that he placed $5,000 contract on the lives of the men on trial here.

THE COURT: You expect to introduce that in this case?

MR. WULIGER: Yes, I expect to do that, if my witnesses are -- will hold up.

THE COURT: Have you gone to the Prosecutor with this?

MR. WULIGER: No,

THE COURT: You feel there is a responsibility to do that?

MR. WULIGER: No, I think it would be fruitless gesture-- fruitless act in the light of the posture of this case.

THE COURT: You mean the Prosecutor would not persue it?

MR. WULIGER: That is my opinion, yes, sir.

MR. MARINO: First I ever heard of any of these accusations, your Honor.

THE COURT: Are you telling me that you are going to have witnesses to

come in here, and are going to testify that they have knowledge that Mr. Jackson has put out a $5,000 contract on each of the defendants?

MR. WULIGER: I am going to put on witnesses that are going to testify that that is what they heard.

THE COURT: That is what they have heard?

MR. WULIGER: That is right.

THE COURT: Mr. Wuliger, you know that is not admissible evidence.

MR. WULIGER: Your Honor, I don't have any witnesses who were there when Mr. Jackson did this. All I know is that the word on the street is that he has put out a $5,000 contract on the lives of these four men.

THE COURT: You expect me to permit evidence from the prosecution of what has been heard on the street?

MR. WULIGER: No.

THE COURT: And you expect me to admit it from your side?

MR. WULIGER: All right, I won't put that evidence on. I asked this man the question. He has denied it.

THE COURT: You could ask any witness whether they have threatened the life of somebody; against you--

MR. WULIGER: Yes.

THE COURT: You think that is a fair tactic?

MR. WULIGER: Yes.

THE COURT: Without proof?

MR. WULIGER: He has denied it. I didn't do it out of the clear blue sky. I did it with some information that this had been done. Whether this information is admissible in a court of law isn't the question. The question at issue, I had some information related to contracts put out on the lives of the four men on trial here. I believe that I have a right to question the witness whether or not he did -- that I don't have admissible evidence you are saying that the word out on the street is not admissible evidence in this case. I can't bring in the people that he contracted with or the people that he entered into that agreement with. I can't do it because it is hearsay, but I certainly didn't base the question out of the clear blue sky. I had some information, and I

don't consider, since I had information, I don't consider that irresponsible or improper.

THE COURT: If it was done against you though you would think otherwise?

MR. WULIGER: I haven't said that. If they have information--

THE COURT: It would be all right for the Prosecutor to bring in here that these fellows threatened to kill Mr. Jackson if he hears that somewhere-- some police informant -- brings that information back to the prosecutor, are you going to feel that is not irresponsible for the prosecutor to then ask them if they take the stand?

MR. WULIGER: I am not going to comment on that because I don't know the circumstances around that.

THE COURT: I just gave you the circumstances.

MR. WULIGER: Well, if they had information that my clients were threatening the lives of somebody, and they questioned, isn't it a fact that you threatened the life of the prosecuting witness, and my client answered "no", and that was the end of it,

and they had information to sustain that, there is probably nothing wrong with the question.

MR. MARINO: I think there would be, your Honor. I think you would have to have viable information that that is admissible information, that it actually had occurred.

In light of what Mr. Wuliger has said, I am going to make a motion that -- I am not quite sure, your Honor, I am not quite sure how to state this because the implications are already before the jury. In light of what Mr. Wuliger said, there is nothing to erase it from their minds, and there is no way of me knowing, your Honor, when Mr. Wuliger expects -- whether or not he has that information. It is a matter of trust.

THE COURT: That is the whole point. I think it is very improper, it is entirely improper to ask a witness a question that implies something that you are not going to later be able to introduce evidence on.

MR. WULIGER: Your Honor, I was hoping some of these witnesses would indicate exactly what their sources of information were

on the stand. But I am not-- I am not naive, I know what is going on in this trial, and I know what is involved in this lawsuit, and whether or not people are going to stick out their necks when they believe that the law, the viable law in this community is represented by Jackson, and not by the prosecutor's office. I have got witnesses that believe that his law is more viable then the law in this courtroom or in the law in this community.

THE COURT: You are also going to have evidence that Detective Copeland takes money from this man?

MR. WULIGER: I hope to have that evidence, yes. Again, your Honor, these acts aren't done-- I don't wish to be limited in my cross-examination -- I contend that there are two members of the East Cleveland Police Department that I have information are in the pay of this man, and that there is at least, at least one, probably more than one who are in his employ on the East Cleveland Police Department, and that this is not news to people on the force of either departments. Now, whether or not these people are going to admit on the stand or not,

I certainly intend on cross-examining on, and if I can get some admission, I am going to.

MR. MARINO: Your Honor, I think the issues that Mr. Wuliger is posing can better be presented during his own case by the same witnesses. To raise these implications on cross-examination of a State's witness is highly improper unless he can present it.

He can just as easily put an individual on the stand saying that Andrew Jackson threatened the lives of those men on his own case rather than have Mr. Jackson answer that question on his own cross-examination. I think it is highly improper that these questions are coming out, and there is nothing the State can do to erase it from the jurors' mind.

MR. ADRIAN: How do you prove a threat if it comes to you by the way of tnnuendo, by the way of telephone, by the way of someone passing it to you? How do you get it? How do you do it?

MR. MARINO: Evidence.

MR. ADRIAN: You have to wait until somebody does it to you? I mean -- I live in the streets, so to speak. My office

is in the ghetto, and this is a real fear when it comes to narcotics, a real fear. We just had another one picked up in the lot last night with eight bullets. So, I don't know, how do you do things like that. I mean, I know it is highly improper, but when you start dealing with narcotics, you are dealing with somebody that walks up to you and holds you up.

MR. KELLEY: I think the best answer is what Mr. Wuliger did yesterday. I think right now if any threats was imminent, that Schoolboy would become his best protector because this record now reflects that there was a mention of that, and he is going to see that nothing happens to him now. I think the best step has been taken.

MR. WULIGER: It happened to me once before. It involved an associate of Mr. Jackson, Henry Jackson who is reputed by Federal Drug Enforcers to be linked with this man, and being one of the largest drug dealers in the community, who also conveyed to me a threat without saying you are threatened. And he and another man approached me in the courtroom when

I was trying a case involving drugs, and I again brought it imediately to the attention of the Court, right in open court, like that.

My name is no secret. I have a family. I am as vunerable just like any man in this room, and it may have been no threat. It may have been a mistake. It may have been nothing. If this man wasn't responsible for it, fine. It may be I am over sensitive.

When I get a call that somebody portrays to be the father of my client when my client has no father -- his father is deceased -- I don't know what to make of that call.

THE COURT: That is just the point. You brought it into this trial, and suggested to the jury that this man has called you, and threatened you.

MR. WULIGER: I have not --

THE COURT: You brought it in, suggested to the jury that this man has put out contracts on the lives of defendants, and threatened defense lawyers in this, and is responsible for the killing of some other people.

MR. WULIGER: Well, that, you can

talk to the police. They will indicate the same thing to you.

THE COURT: All of those items have been introduced here, and if I understand what you are saying here, you are not able to produce any credible or admissible evidence to that effect in this trial. You have interjected all of those issues into this case.

MR. WULIGER: I believe that I can introduce evidence which would warrant that conclusion on a circumstantial basis. What I can't do is perhaps introduce direct evidence, but I believe I can introduce evidence which could be considered by way of inference that these things are going on.

THE COURT: That Mr. Jackson has threatened somebody?

MR. WULIGER: Yes.

THE COURT: And that Mr. Jackson has put contracts out on the lives of people, and--wait Mr. Wuliger just one minute now. I am not going to permit you to evade the direct answers to these questions. Are you going to introduce any testimony that Mr. Jackson put out a contract

on the lives of any of these defendants?

MR. WULIGER: I can't say for certainty at this time that I will do that, and I can't say for certainty that I won't do it. I hope to have that evidence.

THE COURT: Do you have any such evidence now?

MR. WULIGER: I have no evidence now that anyone was present when Mr. Jackson issued such a contract. I have no direct evidence on that.

THE COURT: Do you have any evidence that Mr. Jackson called you?

MR. WULIGER: No.

Your Honor, you said the motion was granted. Which motion were you referring to?

THE COURT: The motion to exclude.

MR. WULIGER: You were granting the prosecution's motion.

THE COURT: Exclude income tax records of Mr. Jackson.

* * * *

THE COURT: Gentlemen, I did

ruled that we are not bringing in all of this evidence on collateral issue of credibility.

Let the record show Mr. Toliver's objection. Credibility has been amply gone into, and in fact as we have brought out here in this discussion this morning quite unfairly impugned.

MR. WULIGER: But the Court is saying that we can't bring in evidence which would be admissible because it is collateral, and we can't bring in evidence which is not admissible because it is hearsay with reference to it. In other words --

MR. KELLEY: The jury has been told --

THE COURT: I have ruled we are not going to bring in income tax returns to show this man's income or lack of income.

MR. TOLLIVER: Well, the jury will get the impression then that as Mr. Wuliger has requested him about his income tax statement, and asked whether or not he will bring it in.

THE COURT: Are you asking me to tell the jury that I have excluded the income tax returns?

MR. TOLLIVER: Yes, Judge.

THE COURT: I certainly will.

MR. TOLLIVER: So at least we know we didn't throw up a smoke screen, and didn't follow through with it.

MR. MARINO: Your Honor, I would ask the Court what it intends to do about the questions asked by Mr. Wuliger?

THE COURT: What do you suggest I do, Mr. Marino? Instruct the jury the same way?

MR. MARINO: That the questions were improper.

THE COURT: Pardon.

MR. MARINO: That the questions were improper.

MR. TOLLIVER: He can't say that to the jury.

THE COURT: Why not, Mr. Tolliver?

MR. TOLLIVER: Because if they were improper, objections having been made, the Court would sustain it.

MR. MARINO: I think the Court ought to tell the jury exactly what took place in this room. That the questions were improper,

that the defense had no evidence that they could have presented on the questions, and that they--

MR. WULIGER: That is not true. The defense has evidence that the Court is going to rule that the hearsay is not admissible--

THE COURT: Wait a minute, Mr. Wuliger. Lets not play games with words. You realized long before you asked those questions that hearsay is not admissible.

MR. WULIGER: I realized long before I asked those questions I have a right to effectively cross-examine a witness that takes the stand, and if I have information--

THE COURT: Do you still maintain that is proper?

MR. WULIGER: I maintain that I did nothing improper. I maintain --

THE COURT: Your sense of propriety leaves a great deal to be desired, Mr. Wuliger.

MR. WULIGER: Maybe instructions made to the jury, it should accurately reflect --

THE COURT: I am going to instruct the jury that you have no evidence which

to be presented to this Court to substantiate the suggestions contained that Mr. Jackson threatened you or had contracts out on anybody.

MR. WULIGER: Why don't you say to the jury that you aren't going to permit any evidence with reference to what people have heard on the street.

THE COURT: Because that is not evidence. Very clearly it is not evidence.

* * * *

(Whereupon the following proceedings were had outside the hearing of the jury, and outside the hearing of the witness, Judy Winegarner, on Wednesday, October 2, 1974.)

THE COURT: Please be seated.

Mr. Wuliger, the Court has directed you on several occasions to make your --

MR. ADRIAN: Your Honor, is the witness allowed to stay here?

THE COURT: You can be excused. Will you step outside, please.

Mr. Wuliger, the Court has directed you several occasions to make your questions relevant. Any explanation as to why they are not?

MR. WULIGER: Your Honor, these questions bear on the witness' bias; credibility, and is proper cross-examination, proper scope of cross-examination.

The curtailing of counsel, both myself, and Mr. Kelley, with reference to the cross-examination, I believe has denied these defendant's their rights to an effective assistance by counsel, and Fifth Amendment Right to confront, and cross-examine their

accusers, and we would move for a mistrial. I believe every question asked was proper.

THE COURT: Including the question, what time she got up this morning?

MR. WULIGER: Yes, it bears upon her ability to reflect, and recall the events that she is testifying from the events of her recollection on the 29th of May, and I think this is perfectly proper to recall those events by asking her questions with reference to it.

Moreover, I think, that to allow questioning on that will develop inconsistencies in her testimony.

THE COURT: Mr. Wuliger, explain your disregard of the Court's instructions that you get down to the issues of what happened that evening.

MR. WULIGER: I believe, your Honor, that I am getting down to the issues of cross examining this witness. I believe that I have properly cross examined this witness.

THE COURT: All right. One other subject matter, Mr. Wuliger. You asked

a series of questions concerning whether Mr. Jackson was violent, is that right?

MR. WULIGER: Yes, sir.

THE COURT: And then you capped it off with a question about whether she knew a certain person, and then whether she knew him any more.

MR. WULIGER: That is correct.

THE COURT: What was the inference pertaining to this question?

MR. WULIGER: That the man is deceased, your Honor.

THE COURT: Yes. And the inference is that Mr. Jackson killed him. That is what you are trying to get to the jury?

MR. WULIGER: He did kill him.

THE COURT: Has he been charged, and convicted of that crime?

MR. WULIGER: He hasn't been convicted of that crime.

THE COURT: We had a discussion about this in chambers yesterday, did we not?

MR. WULIGER: Yes, sir.

THE COURT: And you were clearly instructed too that this is improper cross examination?

MR. WULIGER: We didn't discuss this particular incident, but this situation, this woman knew about, and it bears upon whether or not she is afraid of this man, and she knew--

THE COURT: Mr. Wuliger, you have been instructed clearly that you are not to bring collateral issues into this case, have you not? And specifically, collateral issues about whether somebody else has committed crimes for which they have not been convicted?

MR. WULIGER: Your Honor, if a witness is afraid, and if she was in bed with a man who is now deceased, and that man is now dead--

THE COURT: I asked you whether you had been instructed as I have just indicated?

MR. WULIGER: Your Honor, I believe it is not collateral if a person testifies--

THE COURT: I asked you if you have been instructed as I have just indicated, not what you believe, Mr. Wuliger.

MR. WULIGER: Whatever the record reflects my instructions have--

THE COURT: Do you recall being instructed that way?

MR. WULIGER: I recall with reference to the fact that the Court wouldn't allow me to bring in witnesses saying that they were collateral with reference to purchases of drugs, but I don't recall with reference to cross examination. But if the record reflects it then it occurred.

THE COURT: Your memory is a little short about what happened just yesterday, is it not, Mr. Wuliger?

MR. WULIGER: Well, your Honor--

THE COURT: I find you in contempt of this Court, Mr. Wuliger for improperly bringing inferences before this Court that you know are improper, and I expect it to stop.

Sentence will take place at the close of this trial.

MR. WULIGER: If it please the Court, I would appreciate it if the Court would sentence me now.

THE COURT: You have a trial to complete Mr. Wuliger, and I expect you to do it dispite everything that you have done to try to cause a mistrial in this case.

(Whereupon a recess was taken.)

(Whereupon the following is an excerpt of the cross-examination of Officer Keith Reider, on Friday, October 11, 1974.)

• • • •

BY MR. WULIGER:

Q Officer, have you ever participated in an arrest where the suspect did not get back to the station alive?

MR. MARINO: Objection.

THE COURT: Sustained.

MR. WULIGER: Nothing further.

• • • •

(Whereupon the following is an excerpt of the proceedings had on Friday, October 11, 1974, outside the hearing of the jury.)

THE COURT: Mr. Wuliger, by your last question directed to Officer Keith Reider you again suggested that a witness in this case was guilty of a violent crime in direct violation of the repeated instructions of this Court, and I find you in contempt.

Sentence will be at the conclusion of this case.

FRIDAY MORNING SESSION, October 25, 1974

THE COURT: Mr. Wuliger..

MR. WULIGER:: Yes, sir.

THE COURT: You again engaged in a line of questioning with reference to homicides, Mr. Jackson and the drug traffic.

Will you explain to the Court the purpose of that line of questioning?

MR. WULIGER:: Will I explain to the Court the purpose of that line of questioning?

THE COURT: Yes.

MR. WULIGER:: The line of questioning bears upon several things.

If it please the Court, it bears upon the presence of Cleveland police officers at the scene of the crime. It bears upon the -- It is the contention of the defense that Jackson did not participate in this set up procedure until he had solidified his position in the Cleveland community.

He was engaged in a drug war at that time, a drug war which was resulting in the

deaths of numerous people. That it was not until he had solidified his position that he engaged in the activities as described in this law suit, i.e. brought these men into his home and set them up to make it appear as if they had robbed him.

I was attempting to get to the information with reference to the elimination of Jackson's competition so that we could place it in point of time with reference to this case.

THE COURT: You were again attempting to show that the witness in this case has committed crimes, murder, which he has not been charged with or convicted of?

MR. WULIGER: No, not necessarily that he has committed. Well, maybe -- I guess you would have to say he was involved in them.

I am attempting to show the context.

THE COURT: Mr. Wuliger, you will recall the Court's previous admonitions and the previous two citations for contempt when you engaged in that line of questioning.

MR. WULIGER: I am aware that I have been cited for contempt, yes, sir.

THE COURT: And you are aware of the Court's admonition. You haven't forgotten those, have you?

MR. WULIGER: I am aware of the admonitions the Court gave me.

THE COURT: You are again cited for contempt, Mr. Wuliger.

Sentencing will be at the end of the trial.

---oOo---

(1) ERC

R-166

(Whereupon the following is an excerpt of the proceedings on Friday, October 18, 1974, outside the hearing of the jury, and in open court.)

* * * *

MR. JORDON: May I address the Court?

* * * *

You have received threats from the Faternal Order of Police, and we realize the pressures being put on people. The fact that the police department don't want us back in the streets.

* * * *

THE COURT: You know as well as you know anything that I have been threatened by the Faternal Order of Police, is that right, Mr. Jordon?

MR. HARRIS: Reverend Dewey Fagenberger know it too, and other people. That have people come in to us, talk to us, and told us exactly what is happening in this courtroom. We know about it.

THE COURT: You don't have to have anybody tell you what happens in the courtroom. You have been here every day.

MR. HARRIS: You know we know. You ain't going to tell us -- We stand out there, important people come back here and sitting down in the courtroom, that a lot of people have done seen, and get up and walk out because of the injustices that is practices in the courtroom -- objection, and the sustaining that have been jumping off with the sustaining the objections that will be against us, but you still be sustaining when they be benefiting our case, and our defense. People have been noticing this. People done come to us more than one, more than one has come to us and told us that the Judge has got pressure on him from the Faternal Order of Police, and other people saying that they do not want us out on the street, and if they have us out on the street, that they are going to have your job. Now, they have told us that. Now, you call them a liar, you know, but this is what was related to us.

THE COURT: Yes, Mr. Harris, you know this is a very good point, if somebody says that you are a thief should I let somebody come into testify to this? Would you like that?

MR. HARRIS: They was here.

THE COURT: Who are they?

MR. HARRIS: It was more than one. I stand witness, this brotner stands witness, this brother stands witness, this brother stands witness, and some of these attornies sitting at this table stand witness.

MR. WULIGER: If it please the Court, I have heard the same rumor.

THE COURT: Yes, Mr. Wuliger, you have heard a lot of rumors, and you have attempted to introduce them, and that got you found in contempt.

Have you reported the rumors of the Court being threatened in this case?

MR. WULIGER: I heard a rumor that the Court-- that the Paternal Order of Police has approached the Court in connection with the case. I have heard that rumor.

THE COURT: That is nothing but an out, and out lie, Mr. Wuliger. I want you to tell me who told you that rumor.

MR. WULIGER: I heard it from the defendants.

THE COURT: You heard it from the defendants?

MR. WULIGER: Yes, sir.

THE COURT: Where did the defendants tell you that they heard it.

MR. JORDON: We heard it from officials of the United States of America.

THE COURT: Mr. Wuliger, are you denying that you have the nerve to make a statement like that to this Court, something that you have heard from the defendants who have been in jail?

MR. WULIGER: Sir, I am not denying anything. The man said some of the rumors I heard. I simply indicated to the Court that the man wasn't lying.

THE COURT: Yes, you had heard it from him, right? You bring that up in open Court, Mr. Wuliger, is that right?

MR. WULIGER: I did.

THE COURT: Your sense of propriety amazes me, Mr. Wuliger. Have you taken any action of threats being made on this Court by the police department? Have you taken any action with respect to that?

MR. WULIGER: I didn't hear it was a threat, your Honor.

THE COURT: That is exactly what you said. That they had threatened me.

MR. WULIGER: I heard you had been approached by the Faternal Order of Police.

THE COURT: That is even worse. I am being bribed, approached. What do you mean by approached?

MR. WULIGER: I don't know. That is what I heard. I don't know what it means.

THE COURT: And you would try a case in front of a Court that has been approached without making some report to the prosecutor, Federal Agent, or to somebody?

MR. WULIGER: Yes.

THE COURT: And you have made no report of that?

MR. WULIGER: That is right.

* * * *

EXHIBIT "F"

Public Defender William T. Wuliger is led away to jail by sheriff's deputies Raymond Ray, left, and Dave Hancock after being sentenced to 30 days for contempt of court by Common Pleas Judge Joseph J. Nahra.

Public defender is jailed for 4 hours for contempt

By JIM DUDAS

Staring down from the bench, the judge finished his remarks and sentenced the defendant to 30 days in Cuyahoga County Jail. There was a hush in the courtroom as the sheriff's deputy cracked open his handcuffs and placed them on the defendant.

The procedure was a familiar one to lawyer William T. Wuliger who, as public defender, has witnessed it scores of times.

But this time it was Wuliger wearing the cuffs and being led away to the "bullpen" at County Jail where he would be processed to begin serving his time.

Wuliger was sentenced by Common Pleas Judge Joseph J. Nahra who said Wuliger exhibited "complete contempt for juries and the judicial process" during a recent trial.

BUT WULIGER served only four hours in jail, thanks to a team of lawyers headed by John T. Butler, considered by many to be the dean of criminal court attorneys in the county. Butler's son Dennis F. and Roger S. Hurley, Wuliger's boss in the public defender's office.

Minutes after Wuliger was locked in a cell his lawyers were granted a hearing before the Appellate Court which then ordered Wuliger released on $1,000 personal bond, pending further appeals.

Nahra defended his actions, saying that during a trial Wuliger "apparently believes the rules of fairness do not apply to him and that he can use any means he can to win. He is mistaken."

THE TRIAL, one of the longest in the history of the county, involved four East Cleveland men, three of whom were convicted of aggravated robbery, attempted murder and aggravated burglary in connection with a shootout with East Cleveland and Cleveland police last summer.

tempt three times and warned him about his questioning of witnesses on at least as many occasions.

Despite the warnings, Wuliger, who has a reputation for tenacity in the courtroom, continued to bear down on the witnesses.

WULIGER'S client was one of the three convicted and sentenced to 28 to 100 years in prison. Another defendant was acquitted of all charges.

"It was a frightening experience," said Wuliger of his short stay in jail.

"The judge did what he thought he had to do and during the trial I did what I thought I had to do," he said.

Wuliger's appeal is expected to take months because there are at least 10,000 pages of testimony from the trial that must be transcribed.

There are some lawyers who feel judges can abuse contempt citations and control trials unfairly.

Thus the outcome of Wuliger's appeal is expected to be significant because of recent Supreme Court rulings limiting the use of contempt by judges.

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY

NO. 34240

STATE OF OHIO)
Plaintiff-Appellee)
vs.) SUPPLEMENTAL BRIEF OF APPELLEE
WILLIAM T. WULIGER)
Defendant-Appellant)

In regards to the appellant's contempt citation of October 1, 1974, the record at page 2597 shows a series of questions asked by the appellant, to which the Court repeatedly sustained objections. The purpose of these questions was to give the jury the impression that a State's witness is a murderer, an offense that he was never convicted of or even charged with.

The finding of this contempt appears on page 2605 of the record, after the Court asked the appellant if he recalled the admonitions of the Court of September 30, 1974. (See pages 2597, 2603, 2604, 2605 attached). These pages show that the appellant was repeatedly admonished not to pursue such questioning and that he had been forewarned on September 30, 1974. The Court specifically told the appellant that he was in contempt and furthermore, told him the very reason why he was in contempt. The hearing of September 30, 1974 is found in pages 2315 to 2334.

In regards to appellant's contempt citation of October 11, 1974, at page 4303 the appellant asked the following question to State's witness, Keith Reider:

> "MR. WULIGER: Officer, have you ever participated in an arrest where the suspect did not get back to the station alive?"

Such a question was highly improper and again suggested to the jury that another witness, Keith Reider, a police officer, had murdered someone that he had arrested. This question had nothing to do with the facts of this case, and there was no evidence that Officer Reider had even been associated with such an incident.

On page 4330 of the record the Court found the appellant in contempt:

"THE COURT: Please be seated. You may be excused, Officer.

Mr. Wuliger, by your last question directed to officer Keith Reider, you again suggested that a witness in this case was guilty of a violent crime in direct violation of repeated instructions of this Court, and I find you in Contempt.

Sentence will be at the conclusion of this case."

Again, the Court found the appellant in contempt and told him precisely why he was in contempt; also the Court reiterated that the appellant had been warned previously.

In regards to the appellant's contempt citation of October 25, 1974, the record at page 6375 shows that the appellant asked the following questions, again with the purpose of trying to give the jury the impression that a witness had committed a crime that he was neither charged with or convicted of:

"MR. WULIGER: Now, in conjunction with your work in the Homicide Unit, had you ever heard the name Schoolboy before, Schoolboy Jackson?

***

MR. WULIGER: All right, sir. In the last two years there have been a number of detectives associated with drugs in the City of Cleveland?"

The Court, at pages 6384 and 6385 stated:

(R. 6384, to Mr. Wuliger)

"THE COURT: You were again attempting to show

that the witness in this case has committed crimes; murder, which he has not been charged with or convicted of."

(R. 6385)

"THE COURT: Mr. Wuliger you will recall the Court's previous admonitions and the previous two citations for contempt when you were engaging in that line of questioning?

MR. WULIGER: I am aware that I have been cited for Contempt, yes sir.

THE COURT: And you are aware of the Court's admonitions. You haven't forgotten those, have you?

MR. WULIGER: I am aware of the admonitions the Court gave me."

The Court then found the appellant in contempt a third time.

In each case where the appellant was found in contempt, the record shows that the Court had previsouly warned the appellant not to continue certain lines of questioning, that the Court told the appellant the specific reason why he was found in contempt, and continually warned and admonished the appellant not to ask improper and misleading questions.

The record also shows that the appellant knew and understood why he was in contempt, so there was no purpose in recording the Court's reasoning in the Journal Entry since it had been well documented in the case record and the appellant was told why he was in contempt.

Respectfully submitted,

JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio

BY: Carmen M. Marino
CARMEN M. MARINO
Assistant Prosecuting Attorney
Attorneys for Plaintiff-Appellee
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1560 East 21st Street
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SERVICE

A copy of the foregoing Supplemental Brief of Appellee has been mailed this 7th day of November, 1975, to Roger S. Hurley, John P. Butler and Douglas Rogers, Attorneys for Defendant-Appellant, 2108 Payne Avenue--Room 715, Cleveland, Ohio 44114.

Assistant Prosecuting Attorney

Wuliger.

Q The next question was, have you ever seen him angry?

A Yes, I have seen him angry.

Q Have you ever seen him violent?

A No. Yes, yes, I have.

Q You have. Now, have you ever known -- have you ever observed Schoolboy shoot somebody?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Do you know a man named Louis Sanders?

MR. MARINO: Objection.

THE COURT: Sustained.

Q Do you know a man named Louie Soliver?

MR. MARINO: Objection.

THE COURT: Sustained.

Q You don't know him any more, do you?

THE COURT: Mr. Wuliger, I caution you, make the questions relevant.

Q Now, you indicated that you paid the rent, you pay the utilities in that house. Would you mind telling us what your rent is?

A $115 a month.

Q And what would your -- say electric bill a month be?

A About $26.

THE COURT: Mr. Wuliger, explain your disregard of the Court's instructions that you get down to the issues of what happened that evening.

MR. WULIGER: I believe, your Honor, that I am getting down to the issues of cross-examining this witness. I believe that I have properly cross-examined this witness.

THE COURT: All right. One other subject matter, Mr. Wuliger. You asked a series of questions concerning whether Mr. Jackson was violent, is that right?

MR. WULIGER: Yes, sir.

THE COURT: And then you capped it off with a question about whether she knew a certain person, and then whether she knew him any more.

MR. WULIGER: That is correct.

THE COURT: What was the inference pertaining to this question?

MR. WULIGER: That the man is deceased, your Honor.

THE COURT: Yes. And the inference is that Mr. Jackson killed him. That is what you are trying to get to the jury?

MR. WULIGER: He did kill him.

THE COURT: Has he been charged, and convicted of that crime?

MR. WULIGER: He hasn't been convicted of that crime.

THE COURT: We had a discussion about this in chambers yesterday, did we not?

MR. WULIGER: Yes, sir.

THE COURT: And you were clearly instructed too, that this is improper cross-examination?

MR. WULIGER: We didn't discuss this particular incident, but this situation, this woman knew about, and it bears upon whether or not she is afraid of this man, and she knew --

THE COURT: Mr. Wuliger, you have been instructed clearly that you are not to bring collateral issues into this case, have you not? And specifically, collateral issues about whether somebody else has committed crimes for which they have not been convicted?

MR. WULIGER: Your Honor, if a witness is afraid, and if she was in bed with a man who is now deceased, and that man is now dead --

THE COURT: I asked you whether

you had been instructed as I have just indicated.

MR. WULIGER: Your Honor, I believe it is not collateral if a person testifies --

THE COURT: I asked you if you have been instructed as I have just indicated, not what you believe, Mr. Wuliger.

MR. WULIGER: Whatever the record reflects my instructions have --

THE COURT: Do you recall being instructed that way?

MR. WULIGER: I recall with reference to the fact that the Court wouldn't allow me to bring in witnesses saying that they were collateral with reference to purchases of drugs, but I don't recall with reference to cross-examination. But if the record reflects it, then it occurred.

THE COURT: Your memory is a little short about what happened just yesterday, is it not, Mr. Wuliger?

MR. WULIGER: Well, your Honor --

THE COURT: I find you in contempt of this Court, Mr. Wuliger, for improperly bringing inferences before this Court that you know are improper, and I expect it to stop.

Sentence will take place at the close

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY, OHIO
NO. 34240

STATE OF OHIO

Plaintiff-Appellee

vs.

WILLIAM T. WULIGER

Defendant-Appellant

APPELLANT'S REPLY TO SUPPLEMENTAL BRIEF OF APPELLEE

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IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO
CUYAHOGA COUNTY, OHIO
NO 34348

STATE OF OHIO, :

Plaintiff-Appellee :

vs. : APPELLANT'S REPLY TO SUPPLEMENTAL BRIEF OF APPELLEE

WILLIAM T. WILIGER

Defendant-Appellant :

This cause came before this Honorable Court for oral argument on October 22, 1975. During the course of argument counsel for appellee was questioned as to the specific order which appellant was alleged to have violated and which formed the basis for contempt. Counsel responded that he would cite that order in a supplemental brief in order to assist the Court in its decision.

In reviewing the Supplemental Brief of Appellee, Appellant feels there are two relevant points raised.

First, there exists substantial confusion over the basis for the contempts due to the court's failure to adequately journalize its findings. (See Appellant's Assignment of Error No. I). Appellee relies on the court's journal entry in using the date of the first contempt citation as being October 1, 1974 and the discussion of the pertinent order being made on September 30, 1974. A review of the transcript, however, reveals the error of appellee's reliance on the journal entry. According to the transcript, appellant was found in contempt on October 2, 1975. (See T. 2295-2306). During the discussion on that day, the trial court refers to a discussion in chambers occurring the day before and further states that the appellant was "clearly instructed . . . not to bring collateral issues into this case." (T. 2304).

In reviewing the transcript of the day prior to this finding of contempt, October 1, 1975, there exists a lengthy discussion in chambers. However, at no time is there an order from the trial court to the appellant consistent with the trial court's statement on October 2, 1974. (T. 2315-2344). During that entire discussion in chambers, the record reflects no orders by the trial court to the appellant. The only order issued was made by the court in reference to a request by defense counsel Stanley Tolliver to bring into evidence the income tax records of School boy Jackson. That order consisted of the court granting the prosecution's motion to exclude the records. (T.2331). Other than that order, the record is bare as to any further orders to the appellant which would put him on notice that his questioning in certain areas was contemptious and invviolation of a direct court order.

Appellee also states that the basis for the contempt of October 11, 1974, is clear. However, again a reading of the transcript fails to support this conclusion. The court refers to the appellant's last question to officer Keith Raider. That question was "And at the recess, who was in there?" (T. 4309). Clearly, this question is in no way contemptuous.

The third contempt discussion refers to a prior admonition and refers to a series of questions. Yet at no time does the court cite the specific admonition or when that admonition was made. (T. 6385)

All of these observations underscore the need for this Court to have specific journal entries to review the actions of the lower court. Again the purpose of these journal entries is not for notice to the appellant but for purposes of review and to avoid the type of confusion raised by this record. (See Appellant's Assignment of Error No I.)

Secondly, appellee has again failed to cite the specific order which was violated by the appellant. Appellee has been unable to cite the specific order in the original Reply Brief, in oral argument and finally in this supplemental brief. Similarly appellant is unable to find the specific

order of the court. The failure of appellee to cite any order and the actual lack of a specific order forbidding the appellant to go into the three areas of cross-examination which were the claimed basis for the contempts lends further support to appellant's argument that he was not in contempt of court. (See Appellant's Assignment of Error No V).

The appellant offers the above observations for this Honorable Court's further consideration of the issues raised by his Brief and Assignments of Error and Oral Argument.

Respectfully submitted,

Christopher W. Bohlen
Roger S. Hurley
John P. Butler
Attorneys for Appellant
2108 Payne Avenue
Cleveland, Ohio 44114

S E R V I C E

A copy of the foregoing Reply was mailed to Carmen M. Marino, Attorney for Appellee, 1560 E. 21st Street, Cleveland, Ohio 44114

Christopher W. Bohlen

IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

NO. 34240

IN RE: WILLIAM T. WULIGER : MOTION FOR RECONSIDERATION

ATTORNEY FOR APPELLEE:

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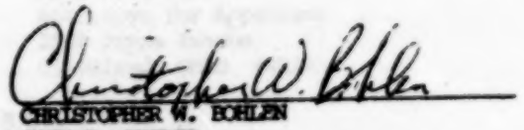
IN THE COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT
CUYAHOGA COUNTY, OHIO

NO. 34240

IN RE: WILLIAM T. WULIGER : MOTION FOR RECONSIDERATION

Now comes the defendant-appellant, WILLIAM T. WULIGER and moves this Honorable Court to reconsider its order of May 7, 1976 insofar as it remands the above captioned matter for an additional finding of facts by the trial court for the reasons stated in the attached memorandum.

Respectfully submitted,



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I. THE FAILURE OF THE TRIAL COURT TO ENTER ON ITS JOURNAL THE FACTUAL BASIS FOR EACH OF THE THREE CONTEMPT CONVICTIONS MANDATES REVERSAL WITHOUT REMAND.

A. CONTEMPT CONVICTIONS INVOKE ON AN APPEAL A PRESUMPTION OF ERROR AS CONTRASTED FROM THE USUAL RULE ON APPEAL.

It is improper for a reviewing court to assume that a lower court's conviction for contempt, in the absence of record evidence, was correct and lawful. State v. Treon, 188 N.E.2d 308 1963; James Hunt v. State, 5 O.C.C. (N.S.) 621, 17 C.D. 16; State v. Herahberger, 83 Ohio Law Abs. 62, 168 N.E. (2d) 13; 11 Ohio Jurisprudence (2d) 163, Contempt, Section 79.

Review of contempt convictions when those convictions are for summary contempt, present to a reviewing court an unique perspective. In such instances a reviewing court is required to presume the innocence of the appellant.

This court in its disposition herein is now allowing the trial court to attempt to make its case against appellant, a case it failed to make for nearly two years. Appellant respectfully urges this court that, since the trial court's journal was insufficient to provide a factual basis for concluding the propriety of those convictions, the appellee has thus failed in its burden, and appellant's presumption of innocence has not been overcome.

Appellant suggests to this court in this unique situation that not only is remand inappropriate, Charles Pinkney, et al. v. The Edward J. DeBartolo Corporation, et al, (Court of Appeals of Ohio Eighth District, No. 34095, 1975), but remand will violate appellant's rights under the prohibitions of the double deopardy clauses as contained in the Fifth Amendment to the Constitution of the United States and Section 10 of Article I of the Ohio Constitution. Benton v. Maryland, 395 U.S. 784 (1969); State v. Treon, 91 Ohio L. Abs. 229 (1963); Charles Pinkney, et al v. Edward J. Debartolo Corporation, et al supra.

II. THE INTENT OF SECTION 2705.01 OF THE OHIO REVISED CODE REQUIRES A CLEAR SHOWING THAT THE CONDUCT WAS OF SUCH A NATURE AS TO REQUIRE IMMEDIATE PUNISHMENT TO PREVENT DEMORALIZATION OF THE COURT'S AUTHORITY. THE FAILURE TO CLEARLY SHOW THE NATURE OF THE CONDUCT COMPLAINED OF AND THE BASIS FOR ITS HOLDING THAT SUMMARY CONTEMPT OCCURRED IS SO INCONSISTENT WITH THE STATUTORY AUTHORITY AS TO BE FATAL TO THE TRIAL COURT'S ADJUDICATION AND REQUIRES REVERSAL AND DISCHARGE OF THE APPELLANT.

The purpose of summary contempt, as provided by Section 2705.01 of the Ohio Revised Code, is to provide a court protection for its authority. When misconduct occurs in open court, in the court's presence, which disturbs the court's business and all of the essential elements of misconduct are observed by the court, then the immediate punishment provided may be invoked where it is essential to prevent demoralization of the court's authority before the public. In Re Oliver, 333 U.S. 257 (1948).

The trial court in the instant case has the power to invoke summary contempt only in the limited situations provided by the statute. Under the authority provided by the statute, the court is empowered to proceed with adjudication and sentencing, without affording the usual due process rights, because it is assumed that the violation will appear clearly on the record and there will be no need for taking of evidence and, further, that immediate action is required to preserve the court's authority. Taylor v. Hayes, supra.

In the instant case, the trial court invoked the authority of the statute permitting summary contempt. It must be presumed that he was aware of the law interpreting the applicable section of the statute. (See Transcript of Proceedings of December 2, 1974). Yet, despite requests by appellant and by counsel for appellant, the trial court refused throughout the proceedings to clarify the record, either by means of a journal entry with a written statement of facts or by means of a statement in the record.

It is the contention of the appellant that such a failure on the

part of the trial court, to provide a record showing clearly how the appellant was in contempt and why his conduct was a threat to the demoralization of the court's authority, should be dispositive of the issue. If the court fails to provide such a record, the presumption by the reviewing court must be in favor of the appellant and contrary to the finding of the trial court, State v. Treon, supra. Where the record does not show the interference of the court's business by the complained conduct, direct contempt is not present.

To allow the trial court now to correct the record is contrary to the purpose of direct or summary contempt. If the situation existed which threatened the court's authority at the time of the conduct, it would be apparent on the record. However, if it is not apparent on the record, then no justification for direct contempt exists and the trial court should have proceeded under the applicable section for indirect contempt. Certainly, the basis for the denial of all of the normal due process guarantees in direct contempt proceedings is because of the obvious and immediate threat to the court's authority. Groppi v. Leslie, 404 U.S. 496 (1972). If that threat is not apparent, then the trial court should have proceeded in indirect contempt and afforded the appellant all of the due process guarantees asserted by appellant in appellant's Brief and Assignment of Error. (See Assignment of Error II). However, if the record does not affirmatively show direct contempt, this court is not in a position to speculate on the existence of indirect contempt either. State v. Treon, supra.

In prior cases decided by this Court, where the trial court has failed to provide an affirmative record as to the basis for its finding of direct contempt, this court has reversed the finding of the trial court and entered a final judgment for the defendant. State v. Treon, supra. at 318; Pinkney v. DeBartolo, (Court of Appeals, No. 34095, 10/9/75). The appellant argues that there is no reason to distinguish the instant case from those

above. Just as in the Pinkney case, in the instant case the trial court "failed to enter a written order setting forth fully, clearly and specifically the facts out of which the contempt arose." (id at 5). The failure of the record to show the basis for the contempts not only fails to provide a record for this court but is contrary to a finding of direct contempt. The appellant contends that this case should have been reversed and not remanded as is consistent with this court's prior holdings. R-190

III. SINCE THIS COURT HAS FOUND THAT THE TRIAL COURT WAS INCAPABLE OF IMPARTIAL AND UNBIASED SENTENCING, IT IS A DENIAL OF DUE PROCESS FOR THE TRIAL COURT TO NOW HAVE THE AUTHORITY TO ADJUDICATE THE QUESTION OF WHETHER THE CONDUCT OF THE APPELLANT IS CONTEMPTUOUS BECAUSE THE ATTITUDE COMPLAINED OF REMAINS IN EXISTENCE.

In its order and opinion of May 7, 1976, this Honorable Court found, in its response to appellant's Assignments of Error III and IV that the trial judge was not so embroiled in the controversy with the appellant at the time of the findings of contempt to require him to excuse himself. However, this Court did find that, at the time of sentencing, that the trial judge was incapable of impartial and unbiased sentencing, and required the court to remove himself from the questioning of sentencing on remand. In support of its finding, this Court refers to certain portions of the transcript in its footnote. The appellant concurs with the court's findings regarding the attitude of the trial court at the time of sentencing. The appellant, however, argues again that this attitude existed at the time of the original contempt citations. All four examples relied upon by this court in its footnote, are the exchanges, which occurred prior to, or at the time of, the initial finding of contempt. (T. 1667, T. 2334, T. 2606).

However, even accepting this Court's findings on this issue, the appellant argues that it would now be improper to permit the trial judge to prepare a journal entry which justifies the finding of contempt, to select what he considers the relevant portions of transcript and then leave the question of sentencing to another court. If the trial judge was biased and partial

toward the defendant at the time of sentencing, there is no evidence to indicate that that condition does not remain at the present time. Indeed, the trial court's perseverance and personal interest in the grievance proceedings, which he filed against the appellant, underscore the trial court's personal attitude toward the appellant at this time. (See Appendix, Exhibit A). 1/ Furthermore, the trial court is also aware of this problem as evidenced by its concurrence with and granting of Appellant's request that the trial court transfer cases in which Appellant is counsel of record and the trial court is assigned. (See Appendix, Exhibit B.)

In applying Taylor v. Hayes, 418 U.S. 488 (1974) this Court has looked to the question of whether the trial court has become embroiled in a running controversy with counsel so as to result in bias, a likelihood of bias or appearance of bias. In applying this test to the question of the trial court at the time of sentencing, this Court has responded affirmatively. Yet, at the same time, this Court now returns to the same trial court's judicial discretion the question of whether the appellant's conduct was contemptuous, and, if in its discretion it finds that it was, this Court calls upon this same trial court judiciously to justify that finding either by transcript portions or journal entry. Upon completion of that task, the trial court, under this Court's opinion, once again loses his freedom from bias and impartiality and must return the case to another court for sentencing.

The appellant contends that holding such a procedure is improper. The appellant contends that, if this Court rejects Propositions I and II, supra.

1/ It is again requested that this court take judicial notice of the proceedings with the Bar Association of Greater Cleveland initiated by the trial court against the appellant. United States v. Meyer, 462 F.2d 827 at 830 (D.C. Cir. 1972).

and rules that a remand is proper in this case, the proper procedure, if the trial court is desirous of proceeding, would be to transfer the guilt - determinative function to the sentencing judge. The appellant requests a determination by an independent trial court, after a full hearing, as to whether the complained conduct is contempt, in an atmosphere of "calm detachment necessary for fair adjudication". Mayberry v. Pennsylvania, 400 U.S. 455 (1971). To do otherwise is to deny the appellant a determination of the facts by a neutral and detached judge, a minimal standard guaranteed by the Due Process Clause of the Fourteenth Amendment of the United States Constitution. In re Murchison, 349 U.S. 113 (1955).

CONCLUSION

For the above reasons the appellant respectfully urges that this Court reconsider its order to remand the instant case, the appellant respectfully requests that an order be entered for reversing the instant decision and entering a final judgment for the appellant.

In the alternative, if this court denies its order of remand was proper, the appellant requests that the case be remanded to a disinterested and detached trial court to determine an adjudication of direct contempt was proper.

Respectfully submitted,

Christopher W. Bohlen

CHRISTOPHER W. BOHLEN
John P. Butler
Roger S. Hurley
2108 Payne Avenue
Room 715
Cleveland, Ohio 44114
621-5980

SERVICE

A copy of the foregoing was served on the office of John T. Corrigan, Cuyahoga County Prosecution this 17 day of May, 1976.

Christopher W. Bohlen

CHRISTOPHER W. BOHLEN

EXHIBIT A

STATE OF OHIO :
:SS AFFIDAVIT
COUNTY OF CUYAHOGA :

ROGER S. HURLEY, being first duly sworn, deposes and says that he is an attorney duly licensed and practicing law in the State of Ohio.

That he is employed by the Legal Aid Society of Greater Cleveland as Director of the Society's Criminal Division.

That he was and is representing his former deputy director, William T. Wuliger, before this court and did so represent said William T. Wuliger before the Grievance Committee of the Bar Association of Greater Cleveland at Grievance Hearings conducted in response to charges filed against William T. Wuliger by Judge Joseph Nahra.

That pursuant to that function he was informed by the Chairman of that committee, David G. Davies, that Judge Nahra was distressed at the preliminary findings of the Committee that Mr. Wuliger's conduct in the court room during his representation of Charles Jordan was not such as to justify a finding by that committee of misconduct.

Moreover, at one hearing, he was told by Chairman Davies that Judge Nahra had called various members of that committee into his chambers in order to explain his position in that matter more fully.

Finally, Affiant was informed further by Chairman Davies of that committee, that when it became clear that that committee would not find Mr. Wuliger's conduct during trial to be of such a nature as to justify a charge of misconduct that Judge Nahra sent another letter to that committee detailing additional matters which that court felt should be considered by the committee.

That a copy of that second letter by Judge Nahra was never afforded to either himself or Mr. Wuliger and he is ignorant as to the contents of same.

That the committee in question finally decided that Mr. Wuliger's conduct in court did not rise to the level of misconduct. Mr. Wuliger was given a private reprimand for allowing himself to be photographed in a posed picture after the sentencing.

Further, Affiant sayeth naught.

ROGER S. HURLEY

SWORN TO, BEFORE ME, and subscribed in my presence this 17th day of May, 1976.

NOTARY PUBLIC

EXHIBIT B

STATE OF OHIO)
) SS:
COUNTY OF CUYAHOGA)

AFFIDAVIT

WILLIAM T. WULIGER, being first duly sworn, deposes and says:

That he is the Appellant in the case entitled, In Re: William T. Wuliger, Court of Appeals case no. 34240.

That he was an assistant Public Defender in 1974, when he was assigned to represent Charles Jordan in Common Pleas Case No. 14174.

That he is presently engaged in the private practice of law.

That his practice still largely consists of the defense of criminal cases.

That since the conclusion of the above case, State of Ohio vs. Charles Jordan, every case in which he has been retained or assigned as counsel of record, and to which Judge Joseph Nahra has been assigned as trial judge, has been transferred to other trial judges upon affiant's request.

That the request for transfer of those cases has been concurred in and granted on each occasion without exception.

Further Affiant sayeth not.

WILLIAM T. WULIGER

Sworn to and subscribed before me this 15th day of May, 1976.

NOTARY PUBLIC

EXHIBIT C

I Fourteenth Amendment to the United States Constitution:

....No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws....

II §2705.02 Ohio Revised Code:

A person guilty of any of the following acts may be punished as for a contempt:
(A) Disobedience of, or resistance to, a lawful writ, process, order, rule, judgment, or command of a court or an officer;

....

III §2705.03 Ohio Revised Code:

In cases under section 2705.02 of the Revised Code, a charge in writing shall be filed with the clerk of the court, an entry thereof made upon the journal, and an opportunity given to the accused to be heard, by himself or counsel....

IV Fifth Amendment to the United States Constitution:

No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

V Ohio Constitution, Article I, Section 10:

In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process to procure the attendance of witnesses in his behalf, and a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed; but provision may be made by law for the taking of the deposition by the accused or by the state, to be used for or against the accused, of any witness whose attendance can not be had at the trial, always securing to the accused means and the opportunity to be present in person and with counsel at the taking of such deposition, and to examine the witness face to face as fully and in the same manner as if in court.

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July 15, 1975

Mr. David G. Davies
Chairman, Grievance Committee
Bar Association of Greater Cleveland
118 St. Clair Avenue
Cleveland, Ohio 44114

Re: Judge Joseph J. Nahra -vs-
William T. Wuliger, Esq.
File No. 74-204

Dear Mr. Davies:

The complaint in caption was referred to the writer for investigation and recommendation. At the suggestion of the former Chairman of this Committee, Mr. Edward Eisele, I requested assistance from you in the investigation of this complaint.

It might be helpful to the members of the Grievance Committee to have a statement as to exactly what has been done in the processing of this grievance.

The complaint was filed by Judge Nahra by letter dated December 12, 1974 with various attachments.

A letter dated December 26, 1974 was sent by Mr. Brady to Mr. Wuliger asking for his response to the questions presented by Judge Nahra.

A letter of response was then received by letter dated January 7, 1975 from C. Lyonel Jones, Director of the Legal Aid Society of Cleveland, on behalf of Mr. Wuliger. In his letter, Mr. Jones asked that the complaint be dismissed.

The Bar Association sent a letter to Judge Nahra dated January 23, 1975, at which time Mr. Eisele, as Chairman of the Grievance Committee, informed Judge Nahra that the Grievance Committee would take no action pending final disposigion of the appeal of the contempt charges filed against Mr. Wuliger.

By letter of February 3, 1975, Judge Nahra expressed his extreme disapproval with the manner in which this complaint was being handled by the Bar Association. On February 6, 1975, Grievance Committee Chairman Eisele and Committee member Armand Cohn met personally with Judge Nahra in his chambers. At that time, Judge Nahra again strongly expressed his opinion that the Committee should not sit on his grievance against Mr. Wuliger.

By letter of February 6, 1975, Grievance Committee Chairman Eisele sent a copy of C. Lyonel Jones' letter of January 7, 1975 to Judge Nahra. In that letter he advised Judge Nahra that a subcommittee chaired by me would gather the facts and report to the full Grievance Committee.

I was then assigned the responsibility of handling this grievance. On February 13, 1975, I checked at the Clerk's office and found that the contempt charges against Mr. Wuliger were being appealed in Court of Appeals Case No. 34240. I further found that the criminal case in which Mr. Wuliger was representing one of the four defendants at the time of his contempt citations was also being appealed and bore Court of Appeals No. 34287. On February 13, 1975, the transcript of the proceedings in the trial court had not yet been filed in either of these two cases. I then went directly to Judge Nahra in his courtroom and advised him as to my handling of the grievance.

On February 19, 1975, I discussed this matter by telephone with Mr. Davies of this Committee and reviewed with him all that I had done to date. I suggested and he agreed that the next step would be for me to wait until the contempt transcript was available. When the contempt case transcript was available, I was to examine it to see if disposition could be made of the grievance. If a review of the transcript in the contempt case was not sufficient, Mr. Davies and I felt that it might possibly be necessary to review portions of the criminal case trial transcript.

On March 4, 1975, I learned from the Clerk's office that the transcript had been filed in the contempt case but had not been filed in the criminal case. On March 5, I made a trip to the Clerk's office and read the transcript of the proceedings in the contempt case, which was only 40 pages long. This transcript had no trial testimony at all in it. It simply covered a November 20, 1974 hearing on the Wuliger motion to have the contempt case heard by a jury and also the Wuliger sentencing by the Court on December 2, 1974.

On March 10, 1975, by telephone Mr. Davies and I again reviewed this matter, and I brought him up to date as to my progress. We both agreed that we wait until the transcript of the criminal case is available because we both felt it vitally important that the full context of each of Mr. Wuliger's alleged acts of misconduct be available. We were interested in knowing, for example, whether or not the prosecutor had provoked any of the alleged acts of misconduct.

By letter of March 19, 1975 from Oliver C. Henkel, Jr., Vice Chairman of the Grievance Committee, Judge Nahra was informed as to our progress in the handling of his complaint. In this letter, Mr. Henkel indicated that the Court's cooperation would be requested in pointing out in the record exactly where the alleged acts of misconduct occurred during the trial.

Judge Nahra responded by letter of March 21, 1975, again expressing his disapproval of the manner in which the grievance was being handled.

I made periodic checks with the Clerk's office, and on May 20, 1975 was informed that the transcript had finally been filed at the Clerk's office on May 16, 1975. The transcript consisted of some 26 volumes and approximately 8000 pages of testimony.

On June 16, 1975, Mr. Davies and I proceeded to the Clerk's office where we spent some three hours reviewing portions of the transcript where the alleged acts of misconduct occurred. In his letter to the Bar Association of December 12, 1974, Judge Nahra was specific as to the identity of the places in the record where the alleged acts of contempt occurred by Mr. Wuliger. Mr. Davies and I were not able to complete a review of all of the pertinent testimony on June 16. On July 14, 1975, Mr. Davies and I again met at the Clerk's office and spent over two hours reviewing together the balance of the portions of the criminal trial transcript where the alleged acts of misconduct on Mr. Wuliger's part occurred. At our meeting at the Clerk's office on July 14, Mr. Davies and I were able to complete our review of the pertinent portions of the criminal case transcript. Because Judge Nahra's original letter of complaint was so specific as to the places in the record where the alleged acts of contempt occurred, we were able to find these places in the record without requesting assistance from Judge Nahra in doing so.

In considering the grievance filed by Judge Nahra against Mr. Wuliger, there are several parts of the Code of Professional Responsibility which should be considered.

DR7-106, Paragraph (C)(1): In appearing in his professional capacity before a tribunal, lawyers shall not:

State or elude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

EC7-25 provides: "... A lawyer should not by subterfuge put before a jury matters which it cannot properly consider."

Canon 7 says that a lawyer should represent a client zealously within the bounds of the law.

The main thrust of Judge Nahra's complaint against Mr. Wuliger is that Mr. Wuliger repeatedly attempted to discredit the chief prosecution witnesses by asking them questions as to whether or not they had committed murder and other acts of violence when Mr. Wuliger had no proof that there had been such occurrences. Mr. Wuliger's response to the Court was that he had heard rumors "in the street" and hoped to produce proof but was never able to do so.

The issue presented here is the matter of drawing a fine line between what constitutes zealous representation by a lawyer of his client and an attorney attempting by subterfuge to put before a jury matters which the jury cannot properly consider.

It is my opinion that Mr. Wuliger may have been overzealous in his representation of his client, but it seems to me that his conduct falls short of any violation of the canons.

The trial of the criminal case in which Mr. Wuliger was representing one of several defendants was very long. The charges were very serious. The theory of the prosecution as to what was going on at the time the various alleged criminal acts occurred was at complete variance with the theory advanced by Mr. Wuliger as to what was going on at the time the alleged criminal acts occurred. The case involved multiple charges of aggravated robbery, aggravated burglary, kidnapping and attempted aggravated murder against each of four defendants. The backdrop against which these events occurred was indeed a sorry and unpleasant

one. The type of people that were involved were "street" people. The situation was such that there undoubtedly were many rumors flying back and forth as to exactly what was happening and why it was happening. It's understandable that these rumors for the most part would have been impossible to prove.

It seems to me that when Mr. Wuliger asked one of the chief prosecution witnesses whether or not he had ever murdered anyone, and when Mr. Wuliger asked East Cleveland Detective Copeland whether or not he had ever arrested anyone and the suspect then not reached the police station alive, that all these witnesses had to do was answer in the negative. This then would have disposed of the issue.

It's also quite understandable that after such a long and serious trial that tempers would become very short on both sides of the bench.

It is the considered opinion of this writer, and this opinion is concurred with, I believe, by our Committee Chairman, Mr. David G. Davies, that the grievance filed by Judge Nahra against Mr. Wuliger be dismissed.

Very truly yours,

John S. Rea

JSR/lw

July 22, 1975.

The Members of the
Grievance Committee
Of the Bar Association
of Greater Cleveland
Mall Building
118 St. Clair Avenue
Cleveland, Ohio 44114

Re: Grievance No. 74-204
Judge Joseph J. Nahra
v. William T. Wuliger, Esq.

Gentlemen:

I would like to amplify somewhat upon Mr. Rea's letter of July 15 concerning this matter. Those of you who participated in the discussion of the case at the July 15 meeting will recognize a great deal of what appears in this memorandum.

Mr. Wuliger's client was one of several young black men, purportedly Muslims, who were involved in a series of events culminating in their being barricaded in an East Cleveland house surrounded by some 300 East Cleveland and Cleveland policemen in a dramatic and highly-publicized incident. The prosecution's version of events was that the defendants went to the house of one "Schoolboy" Jackson intending to rob him. They bound and gagged Jackson, his children, and a woman named Weingarner who was at the time living with Jackson. They then took some merchandise and weapons and went to another apartment where another of Jackson's girlfriends lived, intending to steal more merchandise. In the meantime, however, Weingarner was able to call for help and to tell the police of the defendants' intentions. The police caught them at the second apartment, but they escaped to the O'Brien house, where they barricaded themselves. There was a long exchange of gunfire in which defendants

wounded at least two policemen. Two members of the O'Brien family were badly wounded in the exchange of gunfire, but it appears to be without dispute that they were shot by policemen who mistook them for the defendants as they attempted to leave the house with their hands up.

The defendants claim that they were Muslims who were concerned with Jackson's dominant role in the neighborhood drug racket. They had previously approached Jackson to force him out of the drug business. They came to Jackson's house at Jackson's suggestion on the evening in question with the intention of "converting" Jackson to Islam. He induced them, however, to go to the apartment, where he had set up an ambush. The first shots fired at the defendants were from Jackson's accomplices, not the police. According to the defense version of events, the first policeman to arrive at Jackson's house was a man named Copeland, a detective on the East Cleveland Police Force. The defense argued that he and Mr. Jackson had been in league in protecting Jackson's drug racket and that Mr. Copeland and Mr. Jackson concocted the prosecution version of what had taken place at the first house. The shoot-out at the O'Brien house, said the defense, was the result of police overreaction, and the wounding of the O'Briens demonstrated that the defendants had cause not to surrender immediately. The wounded policeman, claimed the defense, had been hit by police fire, not fire from the house.

There appeared to be no dispute over the fact that Jackson had been investigated for trafficking in narcotics but that the East Cleveland Police Department had never been successful in obtaining the necessary proof for an indictment. It also appeared that Jackson was living rather extravagantly with no visible means of income. On the other hand, the defendants had made written and oral confessions, some of which were held admissible, that were hard to reconcile with the defense version of events. The case was highly publicized, and the defendants were in relatively desperate straits. The essence of their defense was to put Messrs. Jackson and Copeland and the police force in general on trial.

Persistence in Cross-Examination Over Objections

Chronologically, the first trouble brewed during the cross-examination of Miss Weingarner. Wuliger asked if she had seen Jackson shoot anybody. Objection, sustained. Wuliger then asked if she knew "X". Objection, sustained. He then

asked if she knew "Y". Objection, sustained. Finally, he asked if she no longer knew "Y". Again, objection, sustained.

DR7-106 and EC7-25, both quoted in Mr. Rea's letter on page four, forbid a lawyer's using subterfuge to get irrelevant or unprovable matters before a jury. As a practical matter, trial lawyers--and I believe prosecutors particularly--attempt to get as much information of this nature as possible before juries. In this particular instance, however, I have grave doubts that Wuliger did serious violence to either the disciplinary rule or the ethical consideration. The questions did not, by my reading, imply that it was a fact that Jackson had shot "X" or shot and killed "Y". Wuliger was arguably entitled to ask the first question; If Weingarner's answer was "no," the inquiry was ended with an impasse; if it was "yes," Wuliger arguably was entitled to inquire further on the theory of prior similar acts, just as by analogy the defense may attack the character of the victim where self-defense is at issue. It does not appear to have been disputed in this instance that the defendants had taken a weapon or weapons from Jackson's home and that these were returned to Jackson without having been listed in the East Cleveland Police property book.

In summary, trial counsel in the pit would have grounds to believe that the first objection was improperly sustained--and on leisurely reflection, the impression may be correct. The coupling of the questions about "X" and "Y" with the question about shooting is less defensible, but the implication that Jackson had in fact shot "X" and "Y" ("Y" fatally) impresses me as being exceedingly subtle; in fact, it was only after a third reading that John Rea and I realized that the question about no longer knowing "Y" was open to the interpretation that Jackson had killed "Y". In my reading of the record, this sequence of questions, which is where much of the trouble began, did not constitute a statement of or an allusion to a matter that Wuliger had no reasonable basis to believe was relevant; the questions did not imply clearly that facts existed.

Similarly, later in the trial he asked Detective Copeland whether he had ever arrested a subject who did not reach the police station alive. Objection was sustained. Later, out of the hearing of the jury, the judge found Wuliger in contempt for having asked the question. I believe it arguable whether a sustaining of the objection was proper; as in the case of Miss Weingarner, a negative answer would probably

end the inquiry with no damage having been done; a positive answer might raise a question of prior similar acts in a case where police overreaction to a crime by black men had been alleged by the defense.

A trial lawyer, bound by Canon 7 to represent the interests of his client with zeal, has a difficult task in making his record once the judge has forbidden him to pursue certain avenues of questioning. He may expect a reviewing court to look to the record for a demonstration that the questions were asked and that objections were sustained. Reviewing courts have given very little guidance as to how far the trial lawyer may persist in drawing objections. The lawyers may have gone too far in Sacher v. United States, 343 U.S.1 (1952), a review of contempt convictions of the defense team in a nine-month trial of Communist Party leaders before Judge Medina. Among the many charges against the lawyers was I(k), persisting in asking questions after having been forbidden to do so by the trial judge. This particular specification, however, was not before the Supreme Court; it had been disposed of with little comment in the Court of Appeals, 182 F.2d 416 (2d Cir., 1951). The opinion there indicates that, in a trial already involving thousands of pages of transcript, the defense lawyers attempted to read into the record lengthy excerpts from Marx and otherwise attempting a legal filibuster; nothing indicates that Judge Medina had looked on the questions themselves as prejudicial to the prosecution. Contract In re McConnell 370 U.S.230 (1952), where the plaintiff's lawyer in a civil antitrust case persisted in asking questions about conspiracy when the trial judge had ruled (erroneously, it turned out) that he could not do so until he had established damages. Affairs finally reached the point that the lawyer said:

> "We have a right to ask questions which we offer on this issue, and your Honor can sustain their objections to them. We don't have a right to read the answers, but we have a right to ask the questions, and we propose to do so unless some bailiff stops us." (Court's emphasis)

The trial court held this remark to be contemptuous and fined the lawyer. However, notwithstanding the threat, the lawyer did not ask any further questions on the point.

The Supreme Court reversed the conviction for contempt. In an opinion by Justice Black, it held:

> "The arguments of a lawyer in presenting his client's case strenuously and persistently cannot amount to a contempt so long as the lawyer does not in some way create an obstruction which blocks the judge in the performance of his judicial duty."

Compare this language with that of the majority in Sacher 12 years earlier, 343 U.S.1, 9, dealing in generalities and not specifically with persistence in questioning:

> "Of course, it is the right of counsel for every litigant to press his claim, even if it appears far-fetched and untenable, to obtain the court's considered ruling. Full enjoyment of that right, with due allowance for the heat of controversy, will be protected by appellate courts when infringed by trial courts. But if the ruling is adverse, it is not counsel's right to resist it or to insult the judge--his right is only respectfully to preserve his point for appeal. During the trial, lawyers must speak, each in his own time and within his allowed time, and with relevance and moderation. These are such obvious matters that we should not remind the Bar of them were it not for the misconceptions manifest in this case."

And, to generalize still further--

> "Another consideration is the fundamental interest of the public in maintaining an independent Bar. Attorneys must be given a substantial freedom of expression in representing their clients. 'An advocate is at liberty, when addressing the court in regular course, to combat and contest strongly any adverse views of the judge or judges expressed on the case during its argument, to object to and protest against any course which the judge may take in which the advocate thinks irregular or detrimental to the interests of his client * * *. An advocate ought to be allowed freedom and latitude both in speech and in the conduct of his client's case.' Oswald, Contempt of Court, third edition, pages 56, 57. * * * The public interest in an independent bar would be subverted if judges were allowed to punish attorneys summarily for contempt on purely subjective reactions to their conduct or statements." Traynor, Justice (later Chief Justice) for the court in Gallagher v. Municipal Court, 31 Cal.2d 784, 796, 192 P.2d 905, 913.

In the balance, I believe, Wuliger's questions to Miss Weingarner and Detective Copeland fell short even of being overzealous; I question whether a reviewing court in the present state of the law would find them contemptuous.

In General: Contempt v. Misconduct

I have written so far primarily of contempt. Our business, of course, is misconduct. We have little to guide us upon the relationship of the court's contempt power and our power to initiate discipline. Drinker, Legal Ethics, page 41, says, "Repeated acts of contempt may indicate lack of a sound character which is necessary for continuance at the Bar." The principal citation is In re Cannon, 206 Wisc. 374, 409, actually State v. Cannon, 240N.W. 441 (1932). I do not find in the case what Mr. Drinker finds. Perhaps Drinker is authority enough for the proposition that isolated acts of contempt are not the subject of discipline. However, there may be an obverse to the proposition: in the Chicago Seven contempt trial, In re Dellinger, 461 F.2d 389, 399-400 (7th Cir., 1972), the court wrote in passing that the lawyers could not be in contempt for failing to restrain their clients in the numerous uproars that punctuated that trial, but the court expressed no opinion as to whether that failure constituted a breach of professional ethics. It seems to follow, then, that not all contempt is misconduct, but there can be misconduct without its being contempt.

In the present case, notwithstanding the dictum in Dellinger, I believe that we would be entering on very delicate ground in finding misconduct in what may well be constitutionally protected acts of a defense attorney. Members of the Committee may have other opinions as to whether the events just described constitute contempt. However, I believe that we all must agree that the defense of a case of this nature presents extremely delicate constitutional questions, particularly the balancing of the defendant's right of free argument against the maintenance of the trial judge's authority. The law is in somewhat of a state of flux in balancing these considerations. In general, I believe that the issues should be resolved in the courts on a case-by-case basis and that restraint and neutrality on the part of the Bar Association is important. If we were to recommend referral of this particular matter to a trial committee, our position would not be neutral; it would represent a value judgment on the Bar's part in a very delicate area.

Allegations of Pressure on the Court; Street Rumors

The language quoted from Dellinger brings me to another of

Judge Nahra's specifications: Mr. Wuliger's having joined in accusations by the defendants out of the hearing of the jury that the judge was under pressure from the Fraternal Order of Police to convict the defendants. It was here that Wuliger principally relied upon rumors in the street. However, unless I grossly misinterpret the words used, no one stated that the judge had been moved by the pressures, but only that the pressures existed--which they well might have.

Two cases are of particular interest. In Cooke v. U.S., 267 U.S. 517 (1925), the Court affirmed a contempt conviction of a lawyer who had accused a trial judge in writing of not having been "big enough" to withstand the whispered innuendos against the lawyer's client, who had just lost a lawsuit. Not only had there been pressure, said the lawyer, but the judge had yielded. Compare Holt v. Virginia, 381 U.S.131 (1965), where an attorney, moving for a change of venue, alleged that the trial judge had said "He would 'deal with' [the attorney] after he, the judge had dealt with [the attorney's client]." Justice Black, for the majority, wrote:

> "The words were wholly appropriate to the charge of bias in the community and bias of the presiding judge. The issue of truth or falsity of these charges was not heard, the trial court choosing instead to convict and sentence petitioners for having done no more than make the charges."

In this instance, Wuliger does not seem to have gone so far as the lawyer in Holt, nor did even the defendants.

Reference to Personal Experience

Another specification sets out the fact that Wuliger referred to personal experiences and matters outside the record in final arguments. Unquestionably this is improper. Unquestionably, every other lawyer in the case did the same thing. This frequent breach of the Canons is one that could keep us busy full-time but which can be far better handled by objections and proper instructions to the jury.

The General Tenor Before the Jury

One further observation: it was apparent from the exchanges outside the hearing of the jury that there was a very tense situation between Judge Nahra and Mr. Wuliger. Nevertheless, one is struck in reading the transcript of matters before the jury with the courtesy and fairness that they generally exhibited toward one another. Notwithstanding Mr. Wuliger's

having been cited for contempt, the citation dealt with the words he used, not with the manner in which he used them. Both the complainant and the respondent are to be commended for the manner in which they conducted themselves.

The Posed Photograph: Recommended Disposition

As noted at our July 2 meeting, there remains the complaint that Wuliger posed with sheriff's deputies in handcuffs several hours after he was actually taken to the courthouse jail. John Rea is investigating further who set up this posed shot. I suspect the newspaper people. DR2-101(A) forbids a lawyer's participation in publicity "that contains professional self-lauditory statements calculated to attract lay clients." There can be no doubt about participation in newspaper publicity in this instance. It is arguable, however, whether the photograph was "self-laudatory" or "calculated to attract lay clients." In the balance, I believe that the Committee could find that Wuliger was being allowed to present himself as a hero or martyr, so that the second element of the injunction under DR2-101(A) has been fulfilled.

I cannot assess the calmness with which a man assesses his course of action after he has spent his first half day in jail, but I believe that there has been an isolated instance of misconduct in this respect and that a short letter of admonition would be in order. I recommend dismissal of the other counts.

Yours very truly,

DGD:dod

David G. Davies.

RECEIVED OCT 3 19/5 R-210

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ATTORNEYS AT LAW
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TELEX-98 5384

October 1, 1975

C. Lyonel Jones, Esq.
The Cleveland Legal Aid Society
2108 Payne Avenue
Cleveland, Ohio 44114

Re: William Wuliger

Dear Mr. Jones:

This letter will confirm our telephone conversation on September 30, in which I said that the Grievance Committee tentatively expects to hear any additional testimony or arguments that the parties to the Judge Nahra-William Wuliger dispute wish to present. This is a preliminary selection of the date, and you will receive formal confirmation with a notice of a time. As the matter now stands, John Rea and I, as a subcommittee, had recommended dismissal of all charges except one. Our separate letters of July 15 and 22 are enclosed. On September 26, we met with Judge Nahra to tell him of our recommendation and to give him the opportunity to present any further authorities or arguments that he wished, either in person or in writing as he might choose. We believe it appropriate that you have a similar opportunity.

Yours very truly,

David G. Davies

DGD:jk

cc: John Rea

Enclosures

R-211

THE BAR ASSOCIATION OF GREATER CLEVELAND
MALL BUILDING · 118 ST. CLAIR · CLEVELAND, OHIO 44114 · 216/696-3525

November 12, 1975

William T. Wuliger, Esq.
2108 Payne Avenue
Cleveland, Ohio 44114

Re: Grievance File 74-204
The Honorable Joseph J. Nahra--
William T. Wuliger

Dear Mr. Wuliger:

Judge Joseph J. Nahra has complained of your conduct during a number of episodes during and after your defense of one of the defendants in a criminal trial in his courtroom. As you are aware, the episodes complained of fell into two categories: Your persistence in asking questions during cross-examination and other in-trial conduct that the complainant believed violated DR7-106(C)(1) and (2) and, after completion of the trial, your having posed for a photographed reenactment of your being taken into custody after being convicted of contempt.

After careful review of the trial transcript and consideration of the context in which your questions and other in-trial conduct occurred, the Grievance Committee concluded that your actions in the courtroom did not rise to the level of misconduct contemplated as being subject to discipline by the current edition of Rule 5 of the Rules for the Government of the Bar.

The posed photograph, however, is another matter. DR2-101(A) of the Code of Professional Responsibility provides:

> "A lawyer shall not prepare, cause to be prepared, use, or participate in the use of, any form of public communication that contains professional self-laudatory statements calculated to attract lay clients * * *."

Formal Opinion 42 of the Ethics Committee of the American Bar Association, September 17, 1931, considers the question:

> "Whether a lawyer may properly pose for pictures portraying incidents in connection with divorce suits or the several steps from the inception of a divorce case

> to its finish, for publication in magazines or newspapers, the intent being that such publication would be accompanied by some complimentary reference to the attorney * * *."

The Committee concluded:

> "Canon 27 [the predecessor of DR2-101] prohibits indirect as well as direct forms of advertising. Both questions describe conduct which is intended to bring the lawyer and his qualifications a certain branch of his profession into the limelight and must therefore be disapproved as an indirect form of advertising which is forbidden by the Canon."

You have testified before the Grievance Committee that your being taken into custody after conviction by Judge Nahra for contempt of court had been publicized by representatives of other media as those events occurred, that the posed photograph was substantially similar to events that had already been recorded, and that you agreed to pose as an accommodation to the reporter and not with any expectation that the photograph would be prominently displayed in the newspaper.

The Committee concludes, however, that there is no exception to the proscription of DR2-101 whether based on a waiver theory or otherwise, so that your unintentionally having been photographed or videotaped in an actual situation would not justify your later intentional participation in a reenactment of that situation whose sole purpose was further photographs for other media. Likewise, the Committee concluded that you were sufficiently sophisticated to recognize that the photographing of the reenactment of an unusual and colorful event is quite likely to result in publication and circulation of that photograph, whether the subject's primary motive is accommodation to the reporter or obtaining that publicity and circulation.

The Committee also recognized an issue as to whether your picture in handcuffs would constitute "professionaly self-laudatory statements calculated to attract lay clients." It concluded that a reasonable inference to be drawn from the publicity might well be that you are a lawyer who will stand up for his clients' rights in the face of a hostile judge and will make personal sacrifices for his clients--characteristics that we do not fault in themselves, but whose publicity we cannot condone.

Finally, we are not impressed by the argument made on your behalf that, as a member of the Public Defender's office, you would not have been concerned with attempting to attract lay clients. First, the Committee is aware that a defender's office must, in its own way, compete for clients in order to justify continued support and assignment of cases. Second, and perhaps more important, we recognize that at the time you might well have had expectations of entering private practice, and publicity of this nature could well be expected to bring your name before potential personal clients.

These considerations nevertheless have caused the Committee to conclude that formal disciplinary proceedings with respect to your post-trial conduct are not justified at this time. The Committee instead admonishes you to refrain from conduct of a similar nature in the future and to give far more serious consideration to the constraints imposed by DR-101.

A record of this proceeding will be retained in the event that there are further complaints of the same or similar nature.

Yours very truly,

David G. Davies, Chairman
Grievance Committee

DGD:dod

c.c. Thomas Brady, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing RECORD of Defendant-Appellant was sent by regular U.S. mail, postage prepaid, to Counsel for Plaintiff-Appellee, John T. Corrigan and Carmen Marino, at 1200 Ontario Street, Cleveland, Ohio 44114, this day of January, 1977.

Ronald Culp

Supreme Court of the United States

October Term, 1977
No. 77-426

IN RE: WILLIAM T. WULIGER,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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Supreme Court of the United States

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IN RE: WILLIAM T. WULIGER,
Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

To: The Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The issues raised herein were raised in the Ohio Supreme Court on appeal from the ruling of the Court of Appeals for Cuyahoga County, Ohio.

The Ohio courts decided this case in accordance with the statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. Where the Order of the Court of Appeals is not an adjudication of the issues and not a final Court Order or Judgment, there is no appealable issue based on the Court of Appeals' Order.

2. Where a lower court has failed to procedurally record and delineate its Findings of Fact and Conclusions of Law, the Court of Appeals has the authority to reverse the lower court's decision and remand the matter to the lower court for further consideration pursuant to the Court of Appeals' instructions.

STATEMENT OF THE CASE

Petitioner was assigned to represent defendant, Charles Jordan in Case No. CR 14174. During the course of the trial, petitioner displayed a contemptuous attitude toward the Court by asking an objectionable line of questions—questions that the Court had repeatedly admonished petitioner not to pursue.

On October 1, 11, and 25, 1974, the Court found the petitioner in contempt for deliberately disregarding the Court's instructions not to persist in following certain lines of questioning.

In regard to petitioner's contempt citation of October 1, 1974, the record shows a series of questions asked by the petitioner, to which the Court repeatedly sustained objections (R. 2597). The purpose of these questions was to give the jury the impression that a State's witness is a murderer, an offense of which he was neither convicted nor even charged.

After the Court asked petitioner if he recalled the admonitions of the Court of September 30, 1974, there was a finding of contempt (R. 2597, 2603, 2604, 2605). The record reflects that petitioner was repeatedly admonished not to pursue such questioning and that he had been forewarned on September 30, 1974. The Court specifically told petitioner that he was in contempt and further, told him the very reason why he was in contempt (R. 2315 to 2334).

Petitioner asked the following question of State's witness, Keith Reider:

> "MR. WULIGER: Officer, have you ever participated in an arrest where the suspect did not get back to the station alive?" (R. 4304)

Such a question was highly improper and again suggested to the jury that another witness, Keith Reider, a police officer, had killed someone that he had arrested. This question had nothing to do with the facts of this case, and there was no evidence that Officer Reider had even been associated with such an incident.

The Court then found petitioner in contempt:

> "THE COURT: Please be seated. You may be excused, Officer.
>
> Mr. Wuliger, by your last question directed to Officer Keith Reider, you again suggested that a witness in this case was guilty of a violent crime in direct violation of repeated instructions of this Court, and I find you in contempt.
>
> Sentence will be at the conclusion of this case." (R. 4330)

Again, the Court found petitioner in contempt and told him precisely why he was in contempt; also the Court reiterated that petitioner had been warned previously.

In regard to petitioner's contempt citation of October 25, 1974, the record at page 6375 shows that petitioner asked the following question, again with the purpose of trying to give the jury the impression that a witness had committed a crime that he was neither charged with nor convicted of:

> "MR. WULIGER: Now, in conjunction with your work in the Homicide Unit, had you ever heard the name Schoolboy Jackson?
>
> • • •
>
> MR. WULIGER: All right sir, in the last two years there have been a number of detectives associated with drugs in the City of Cleveland?"

The Court, at pages 6384 and 6385 stated:

(R. 6384, to Mr. Wuliger):

> "THE COURT: You were again attempting to show that the witness in this case has committed crimes; murder, which he has not been charged with or convicted of."

(R. 6385):

> "THE COURT: Mr. Wuliger you will recall the Court's previous admonitions and the previous two citations for contempt when you were engaging in that line of questioning?
>
> MR. WULIGER: I am aware that I have been cited for contempt, yes, sir.
>
> THE COURT: And you are aware of the Court's admonitions. You haven't forgotten those, have you?
>
> MR. WULIGER: I am aware of the admonitions the Court gave me."

The Court then found petitioner in contempt a third time.

In each case where petitioner was found in contempt, the record shows that the Court had previously warned petitioner not to continue certain lines of questioning, that the Court told the petitioner the specific reason why he was found in contempt, and continually warned and admonished the petitioner not to ask improper and misleading questions.

The record also shows that petitioner knew and understood why he was in contempt, so there was no purpose in recording the Court's reasoning in the Journal Entry since it has been well documented in the case record and the petitioner was told why he was in contempt (R. 2597-2605).

On December 2, 1974, the Court sentenced the petitioner to 30 days in the County Workhouse for having been found in contempt on October 1, 11, and 25.

Petitioner appealed the contempt convictions. The Court of Appeals reversed the contempt convictions and remanded the case for the purpose of having the trial court journalize its findings of fact and conclusions of law; having another court sentence petitioner; and for a finding and delineation of the facts constituting the acts of contempt.

Petitioner appealed the Court of Appeals' Order remanding the case to the Supreme Court of Ohio. A Memorandum Opposing Jurisdiction was filed. The Ohio Supreme Court accepted jurisdiction of the case. On appeal the Ohio Supreme Court dismissed the appeal for want of a final appealable order.

Now the Petitioner files this Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

1. Where the Order of the Court of Appeals is not an adjudication of the issues and not a final Court Order or Judgment, there is no appealable issue based on the Court of Appeals' Order.

In *State v. Treon*, 91 Ohio L. Abs. 229, 188 N.E.2d 308, the general rule in cases of direct contempt is stated to be that the trial court's judgment or order of direct contempt must itself contain a complete and clear statement of the facts upon which the conviction is based. The guilt of a person accused of contempt must be shown affirmatively on the record before a reviewing court may affirm. Also see *State v. Weimer*, 37 Ohio St. 2d 11, 305 N.E.2d 794 (1971); *State v. Hershberger*, 83 Ohio L. Abs. 62, 168 N.E.2d 13 (1960); *U. S. v. Marshall*, 451 F.2d 372 (9th Cir., 1971); *Ex Parte David W. Brown*, 530 S.W.2d 228 (Missouri Supreme Court, 1975); *U. S. v. Schrinisher*, 493 F.2d 842 (5th Cir., 1974). However, *Treon* and parallel cases are not binding authority as to what remedy a reviewing court must resort to when the trial court's reasoning upon which a direct contempt conviction is based is inadequately expressed in the journal entry or completely absent therefrom.

A "final order" is defined in the Ohio Revised Code, Section 2505.02 as:

> "An order affecting a substantial right in an action which in effect determines the action and prevents a judgment, an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, or an order vacating or setting aside a judgment and ordering a new trial is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial."

Cincinnati v. Cormany, 96 Ohio St. 596, 118 N.E. 1092 and *Realty Holding v. State*, 115 Ohio St. 736, 156 N.E. 143 explain that it is necessary that a final order or judgment be entered in the Court of Appeals to warrant an appeal on law questions to the Supreme Court of Ohio. A judgment of a reviewing court is complete, final, and reviewable when its action and instructions to the trial court are definitely stated, the reasons therefore are clearly recited, no required action is omitted and the cause is remanded to the trial court for retrial. *Lesh v. Lesh* (1941), 138 Ohio St. 492, 37 N.E.2d 383, 210 Ohio Ops. 362.

On applying the aforementioned requirements for an appeal of an order to the instant case it becomes apparent from the evidence that the order in question is not a final order and, therefore, cannot support an appeal to the Supreme Court of Ohio. The Court of Appeals' Journal Entry reflects that the issues of whether the petitioner was actually in contempt of court and whether the thirty day sentence imposed was disproportionate were not adjudicated. These matters were remanded for delineation of the facts to support them which were absent from the record.

The Court of Appeals' Order reversing and remanding the case for further proceedings is not a final order because it does not meet the text of *Lesh v. Lesh, supra.* The order is not dispositive of the issues involved and further action in the trial court is necessary before the issues may be resolved. Also see *Bolles v. Stockman*, 42 Ohio St. 445. Since the order is not a final order, it cannot support an appeal to the Supreme Court.

In *People v. Miller*, 51 Ill.2d 76 (1972) the Court noted that direct contempt is predicated upon specific misconduct, and an order imposing punishment for direct contempt must state, or the record must show, the specific

acts upon which it is based, and the order must be sustained upon the grounds upon which it was imposed. The Court went on to hold that an order charging counsel with direct contempt will be reversed (with no remand for further proceedings) where the conduct was a good faith attempt to represent clients and did not hinder the court's function or dignity. Also see *Ward v. State,* 513 P.2d 350 (Okla. Ct. of Crim. App. 1973); *State v. Aspell,* 10 Ohio St. 2d 1, 225 N.E.2d 226 (1967); *Robinson v. State,* 19 Md. App. 20, 308 A.2d 712 (1973); *Pinkney v. DeBartolo* (Cuyahoga Co. #34908, 1975). *Miller* and parallel cases may be distinguished from the present fact pattern because in *Miller et al.,* however inadequate the records were, they were sufficient for the reviewing courts to ascertain the quality of counsel's conduct and conclude that it did not constitute a direct contempt of court. In the instant case, facts necessary to decide the issues are absent from the record. Therefore, *Miller* and parallel cases are not controlling precedent.

An order to remand for further proceedings is not tantamount to placing the petitioner in jeopardy a second time in violation of the double jeopardy clause of the Fifth Amendment of the United States Constitution and Section I, Article 10 of the Constitution of the State of Ohio. Simply stated, double jeopardy stands for the legal principle that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be litigated between the same parties in any future law suit. *U. S. v. Oppenheimer,* 242 U.S. 85, 37 S. Ct. 68 (1916). On applying the principle of double jeopardy to the instant fact pattern, it is clear that there is no danger of exposing petitioner to a double jeopardy situation. An order reversing and remanding a case is not a final order. See *Bolles v. Stockman, supra.* Therefore, the proceeding at the trial court level on remand does not subject petitioner to double jeopardy.

2. Where a lower court has failed to procedurally record and delineate its Findings of Fact and Conclusions of Law, the Court of Appeals has the authority to reverse the lower court's decision and remand the matter to the lower court for further consideration pursuant to the Court of Appeals' instructions.

If because of the condition of the record the Court on appeal cannot determine what judgment should be made, it may remand the case for further proceedings in the trial court. If the record is insufficient to justify entry or direction of a decree, or the evidence is inadequate to support a material issue, no final decree is rendered in the appellate court except to the extent of setting aside the decree in the lower court and requiring further proceedings to be had therein. Ohio Revised Code, Section 2701.01. This power of the appeals court to remand is represented in case law by the view in *Martin Baking Company v. Tompkinson,* 27 Ohio App. 355, 161 N.E. 288, in which the court held that where the doctrine of last clear chance was not in issue, appellate court will not render final judgment for plaintiff on the grounds that she was contributorily negligent as a matter of law, but will remand the cause for further proceedings.

In the instant case, the lower court did not journalize its Findings of Fact and Conclusions of Law on the issue of contempt nor in justification of the sentence imposed. In light of the above mentioned authority it was fully within the discretion of the Court of Appeals to reverse and remand this cause of action for further proceedings to complete the record.

Tumey v. Ohio, 273 U.S. 510 (1927) states the rule that to subject a defendant to a trial in a criminal case involving his liberty or property before a judge having a direct, personal, substantial interest in convicting him

is a denial of due process of law. *Tumey* is not precedent for procedure in a direct contempt case such as the one at bar. *Cooke v. U. S.*, 267 U.S. 517, 539 is the leading case for procedure in instances of direct contempt. *Cooke* provides that when a contempt is committed in open court, it may be adjudged and punished summarily upon the court's own knowledge of the facts, without further proof, without issue or trial, and without hearing an explanation of the motives of the offender. Also see *Ex Parte Terry*, 128 U.S. 289. But where the contempt was not in open court due process of law requires charges and that the accused be advised of them and be given a reasonable opportunity to defend or explain, with the assistance of counsel, if requested and the right to call witnesses in proof of exculpation or extenuation.

In *In re*: *Murchison*, 349 U.S. 133 (1950) a Michigan judge served as a "one-man grand jury" under Michigan law in investigating crime. Later, the same judge, after a hearing in open court, adjudged two of the witnesses guilty of contempt and sentenced them to punishment for events which took place before him in the grand jury proceedings. It was held on appeal that their trial and conviction for contempt before the same judge violated the Due Process Clause of the Fourteenth Amendment. Also see *Unger v. Sarafite*, 376 U.S. 575 (1964). *Unger* and *Murchison* can be differentiated from the instant fact pattern in that here the judge which found petitioner in contempt is not on the appeals court which reviewed the case. Therefore, petitioner has not been denied due process by having had his case reviewed on appeal by a judge who has a direct, personal or substantial interest in convicting him. *Tumey v. Ohio, supra.*

In *Taylor v. Hayes*, 418 U.S. 488 (1974), the trial court's conduct, in proceeding summarily after trial to

punish petitioner for alleged contempt committed during the trial without giving him an opportunity to be heard in defense or mitigation before he was finally adjudged guilty and sentence was imposed, was in contravention of the Due Process Clause of the Fourteenth Amendment. The reviewing court held reasonable notice of the specific charges and an opportunity to be heard in front of another judge should have been afforded because it appeared from the record that "marked personal feelings were presented on both sides" and that the convicting judge was unable to remain impartial. Also see *Mayberry v. Pennsylvania*, 400 U.S. 455, 464.

Taylor is distinguishable from the case at bar and others concerning "the trial judge's power for the purpose of maintaining order in the courtroom to punish summarily and without notice or hearing contemptuous conduct committed in his presence and observed by him". *Taylor v. Hayes*, 418 U.S. at 497. In *Taylor* the final adjudication and sentence were postponed until after trial when the usual justification of necessity is not nearly so strong. See *Offutt v. United States*, 348 U.S. 11, 14 (1954).

CONCLUSION

Respondent, State of Ohio, respectfully moves this Court to dismiss the petitioner's Petition for Writ of Certiorari for want of a substantial Federal Constitutional issue.

All the facts of this case are governed by Ohio Law. The Cuyahoga County Court of Appeals for the Eighth Judicial District and the Ohio Supreme Court properly heard and disposed of all relevant issues arising from this case.

Ohio Law was properly interpreted and applied to the issues of this case by the Ohio Courts.

There is no basis for the Petition for Writ of Certiorari.

For the above reasons we respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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